

IN THE

Supreme Court, U.S.
FILED

Supreme Court of the United States

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OCTOBER TERM, 1988

JOSEPH F. SPANIOLO,
CLERK

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

v.

NANCY J. SCHWALB AND WILLIAM McGLONE,
Respondents.

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

ROBERT T. GOODE, JR.,
Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT
OF VIRGINIA

CONSOLIDATED JOINT APPENDIX

WILLIAM T. PRINCE*
EDWARD L. OAST, JR.**
JOHN Y. RICHARDSON, JR.
JOAN F. MARTIN
WILLIAMS, WORRELL,
KELLY, GREER & FRANK
600 Crestar Bank Building
Norfolk, Virginia 23510
804-624-2600
Attorneys for Petitioners

**Counsel of Record*

In No. 87-1979

***Counsel of Record*

In No. 88-127

C. GERARD THOMPSON
MOODY, STROPLE AND
KLOEPPEL, LTD.
Commerce Bank Building
500 Crawford Street
Portsmouth, Virginia 23705
804-393-4094
Attorneys for Respondents
Schwalb and McGlone

RICHARD J. TAVSS
Counsel of Record

BRUCE A. WILCOX
TAVSS, FLETCHER &
EARLY, P.C.

Suite 100, Royster Building
Norfolk, Virginia 23514
804-625-1214

Attorneys for Respondent
Goode

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RELEVANT DOCKET ENTRIES

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**VIRGINIA: IN THE CIRCUIT COURT FOR
THE CITY OF NEWPORT NEWS**

LAW NO. 8827-S

NANCY J. SCHWALB,

Plaintiff,

vs.

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
A CORPORATION,**

Defendant.

MOTION FOR JUDGMENT

Plaintiff moves the Court for judgment and award of execution against the Defendant, in the sum of \$1,000,000.00, on the following grounds:

1. This action arises under the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, et seq., as hereinafter more fully appears.
2. During all times mentioned herein, Defendant owned and operated, in interstate commerce, a railroad, and the operations and work of the Plaintiff, as hereinafter alleged, were a part and parcel of the operation of the Defendant's line in interstate commerce at the time of injuries to the Plaintiff.
3. Plaintiff is a resident of Newport News, Virginia, and at all times herein mentioned, was employed by the Defendant as a laborer, and worked at said job in the City of Newport News, on the Defendant's premises, which premises were owned, operated and controlled by Defendant.
4. Jurisdiction and venue lie with this Court by virtue of the foregoing.

5. That on January 12, 1983 at about 12:15 a.m. of said day, the Plaintiff was engaged in the customary performance of her duties, and was required by Defendant to be working in its yards in Newport News, Virginia, under the supervision of other employees of the Defendant. Plaintiff was required to clean the trunion rollers which required her to walk on the catwalk, which was not lighted. As Plaintiff was walking on the catwalk to the rollers, she missed a step which she could not see causing her to fall forward, striking her head on the metal catwalk, and became unconscious, and injuring her thumb on the railing. Plaintiff was required to work in a dark and dangerous place which was not lighted. Defendant failed to provide a flashlight or other adequate lighting. Defendant failed to provide adequate help and assistance and failed to provide any safety devices. Plaintiff was then and there and at all times herein mentioned, acting in the exercise of reasonable care for her own safety.

6. At all pertinent times it became and was the duty of Defendant to:

- (a) Furnish Plaintiff a reasonably safe place to work.
- (b) Exercise reasonable care and caution for the safety of Plaintiff while she was performing said work.

7. While Plaintiff was engaged in the performance of the aforesaid work required by Defendant, she was caused to sustain injuries as hereinafter set forth by reason of the violation of the Defendant of its aforesaid duties.

8. At said time and place, the Defendant and its employees as aforesaid, in violation of the Federal Employers' Liability Act of the United States, carelessly and negligently did one or more of the following acts or omissions which were the cause of said occurrence, and the injuries sustained by the Plaintiff.

- (a) Failed to furnish Plaintiff a reasonably safe place within which to do her said work;

- (b) Failed to provide plaintiff with safe and proper tools and equipment to do said work;
- (c) Failed to provide a flashlight and/or adequate lighting to safely do said work;
- (d) Failed to provide adequate help and assistance;
- (e) Failed to inspect, repair and maintain its premises;
- (f) Failed to adopt, enforce, and carry out safe customs and practices in doing said work;
- (g) Negligently assigned Plaintiff to walk on a dangerous catwalk without providing adequate safety precautions and equipment; without providing a flashlight; without providing adequate lighting; without providing adequate help and assistance; negligently assigning plaintiff to walk on a catwalk which was not lighted, all of which Defendant knew or should have known in the exercise of due care was dangerous and unsafe for Plaintiff.
- (h) Other acts of negligence which may be shown at trial.

9. As a direct and proximate result of the aforementioned negligence and carelessness of the Defendant and its employees and its Violation of the Federal Employers' Liability Act as aforesaid, Plaintiff has suffered severe injuries to her head and thumb, has suffered severe brain damage, and was otherwise injured; has suffered pain in the past and will suffer pain in the future; has incurred expenses for medical attention and hospitalization and will incur further like expenses in the future, has suffered loss of earnings in the past and will suffer same in the future; has suffered permanent injury and disability, all to her injury and damage.

10. That by reason of the foregoing, Plaintiff has sustained damages at the hands of the Defendant in the sum of \$1,000,000.00.

WHEREFORE, Plaintiff demands judgment against the above named defendant, The Chesapeake and Ohio Railway Company, a Corporation, in the sum of \$1,000,000.00, together with the costs of the action incurred herein.

NANCY J. SCHWALB

By /s/ Peter W. Rowe
Of Counsel

By /s/ Donald L. Rudquist
Of Counsel

Peter W. Rowe, Esq.
STACKHOUSE, ROWE & SMITH
1400 Virginia National
Bank Building
P. O. Box 3570
Norfolk, Virginia 23514
Tel: (804) 623-3555

and

Donald L. Rudquist, Esq.
DePARCQ, PERL, HUNEGS,
RUDQUIST & KOENIG, P.A.
608 Building, Room 565
608 Second Avenue South
Minneapolis, Minnesota 55402
Tel: (612) 339-4511

VIRGINIA: IN THE CIRCUIT COURT FOR
THE CITY OF NEWPORT NEWS

—
LAW NO. 8827-S
—

NANCY J. SCHWALB,

Plaintiff.

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
A CORPORATION,

Defendant.

SPECIAL PLEA TO JURISDICTION

Now comes the defendant whose proper name is The Chesapeake and Ohio Railway Company and appearing specifically in response to the plaintiff's Motion for Judgment says that this court lacks jurisdiction herein on the ground that the plaintiff's sole and exclusive remedy upon the matters alleged in the Motion for Judgment is under the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 905(a).

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY

By /s/ Richard Wright West
Of Counsel

Richard Wright West, Esquire
WEST, STEIN, WEST & SMITH, P.C.
P. O. Box 257
Newport News, VA 23607
Counsel for Defendant

**VIRGINIA: IN THE CIRCUIT COURT OF
THE CITY OF PORTSMOUTH**

AT LAW NO. _____

WILLIAM C. MCGLONE,

Plaintiff,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant.

SERVE:

Aubrey R. Bowles, III, Esquire
Registered Agent,
Chesapeake & Ohio Railway Company
901 Mutual Building
Richmond, Virginia 23219

MOTION FOR JUDGMENT

The plaintiff hereby moves this Honorable Court for a Judgment and an award of execution against the defendant, the Chesapeake and Ohio Railway Company, in the sum of Two Million Five Hundred Thousand Dollars (\$2,500,000.00) by reason of the following facts, to-wit:

1. That the defendant is a Railroad Corporation organized and existing under and by virtue of the laws of the State of VIRGINIA, and was, at all times mentioned herein doing business within the jurisdiction of this Court as a common carrier of intrastate and interstate commerce.
2. The plaintiff's action arises under the following Act of Congress of April 22, 1908, 35 Stat. 65, Chap. 149, with amendments thereto, more commonly known as "The

Federal Employers' Liability Act" (45 USCA Chap. 2, Sec. 51-60), as amended on August 11, 1939.

3. That at all times herein mentioned defendant was an intrastate and interstate carrier and was engaged in interstate transportation and commerce. At the time of his injury, plaintiff was working in furtherance of interstate commerce and participating in work which directly, closely and substantially affected the general interstate commerce carried on by the defendant.

4. That on or about February 1, 1983 the plaintiff was an employee of the defendant, Chesapeake and Ohio Railway Company, as a laborer, and on or about said date, while so employed in the regular course of his duties on land at Newport News, Virginia, was injured while performing such duties, to-wit: While trying to blow coal out from beneath Number Three (3) Belt a roller caught the air hose and jerked the hose and plaintiff's right arm into the roller causing him serious injury.

5. The defendant herein regularly and systematically conducts affairs or business activity within the City of Portsmouth, Virginia.

6. That the defendant negligently and carelessly failed to provide plaintiff with a safe place to work, and required plaintiff to work on premises that were maintained in a negligent manner; that defendant negligently and carelessly failed to provide plaintiff with adequate, effective, and efficient assistance, equipment and instructions or time to carry out his duties, and failed to maintain and provide plaintiff efficient and safe equipment; that defendant's agents, servants and employees acted in a negligent and careless manner; that defendant failed to properly inspect its equipment and premises and that as a result of the aforesaid carelessness and negligence of the defendant the plaintiff was caused to suffer severe and permanent injuries.

7. That the defendant Railway Company failed to comply with the Federal Employers' Liability Act (45 USCA Chap. 2, Secs. 51-60) as amended on August 11, 1939, as hereinbefore more fully appears.

8. That as a result of the accident of February 1, 1983 the plaintiff was caused to lose, and he will in the future be caused to lose, income which he otherwise would have earned.

9. That as a result of the accident of February 1, 1983, the plaintiff was caused to suffer, and will in the future be caused to suffer, great physical pain and mental anguish.

10. That as a result of the accident of February 1, 1983, the plaintiff was caused to expend, and he will in the future be caused to expend, large sums of money for medical expenses.

11. That as a result of the accident of February 1, 1983, the plaintiff was caused to be unable, and he will in the future be unable, to perform his necessary and lawful affairs.

WHEREFORE, plaintiff demands a trial by jury and prays for judgment against the defendant, The Chesapeake and Ohio Railway Company, in the sum of Two Million Five Hundred Thousand Dollars (\$2,500,000.00) with interest and his costs.

WILLIAM C. MCGLONE

By /s/ Russell N. Brahm, III
Of Counsel

Russell N. Brahm, III
Willard J. Moody
Moody, Strople, Brahm
& Lawrence, Ltd.
P. O. Box 1138
Portsmouth, Virginia 23704-1138

**VIRGINIA: IN THE CIRCUIT COURT OF
THE CITY OF PORTSMOUTH**

LAW NO. L-83-327

WILLIAM C. MCGLONE,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant.

SPECIAL PLEA TO JURISDICTION

Now comes the defendant appearing specially in response to the plaintiff's Motion For Judgment and says that this court lacks jurisdiction herein on the ground that the plaintiff's sole and exclusive remedy upon the matters alleged in the Motion for Judgment is under the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 905(a).

**THE CHESAPEAKE AND OHIO
RAILWAY COMPANY**

By /s/ Richard Wright West
Of Counsel

Richard Wright West, Esquire
WEST, STEIN, WEST & SMITH, P.C.
P. O. Box 257
Newport News, VA 23607
Counsel for Defendant

**VIRGINIA: IN THE CIRCUIT COURT OF
THE CITY OF NORFOLK**

AT LAW NO. L86-335

ROBERT T. GOODE, JR.,

Plaintiff.

v.

NORFOLK AND WESTERN RAILWAY CO.,

Defendant.

Serve: Richard A. Keeney
Registered Agent
8 North Jefferson Street
Roanoke, Virginia 24042

MOTION FOR JUDGMENT

The Plaintiff hereby moves this court for a judgment and an award of execution against the Defendant, Norfolk and Western Railway Company, in the sum of One Million Two Hundred Fifty Thousand Dollars, (\$1,250,000.00) by reason of the following facts, to-wit:

1. That the Defendant is a railroad corporation organized and existing under and by virtue of the laws of the State of Virginia, and was, at all times mentioned herein doing business within the jurisdiction of this Court as a common carrier of intrastate and interstate commerce.
2. That Plaintiff's action arises under the Acts of Congress of April 22, 1908, 35 Stat. 65, Chapter 149, with amendments thereto, commonly known as The Federal Employers' Liability Act (45 USCA Chap. 2, Sec. 51-60),

as amended August 11, 1939, as hereinafter more fully appears.

3. That at all times herein mentioned Defendant was an intrastate and interstate carrier, and was engaged in interstate transportation and commerce. At the time of his injury, Plaintiff was working in furtherance of interstate commerce and participating in work which directly, closely and substantially affected the general interstate commerce carried on by the Defendant.

4. That on or about February 11, 1985, Plaintiff was an employee of the Defendant and on or about said date, while so employed, in the regular course of his duties at or near the Barney Yard, Lamberts Point Yard, Norfolk, Virginia, Plaintiff was injured while performing such duties.

5. That the Defendant negligently and carelessly failed to provide Plaintiff with a safe place to work; required Plaintiff to report and work on premises that were maintained in a negligent manner; that Defendant negligently and carelessly failed to maintain and provide the Plaintiff sufficient and safe equipment; that Defendant negligently and carelessly failed to inspect, repair and maintain the area of the accident and failed to warn Plaintiff of a dangerous condition that existed in the work area; that the Defendant failed to provide sufficient and adequate assistance for Plaintiff to safely perform his work duties; that the Defendant negligently and carelessly allowed a dangerous condition to exist; that Defendant failed to use modern, safe and efficient equipment in the machinery on which Plaintiff was required to work; and that as a result of the aforesaid carelessness and negligence of the Defendant, the Plaintiff was caused to suffer severe and permanent injuries.

6. That the Defendant failed to comply with The Federal Employers' Liability Act (45 USCA Chap. 2, Secs. 51-60)

as amended on August 11, 1939, as hereinbefore more fully appears.

7. That as a result of the accident complained of herein, the Plaintiff was caused to lose, and will in the future be caused to lose, income which he otherwise would have earned.

8. That as a result of the accident complained of herein, the Plaintiff was caused to suffer, and will in the future be caused to suffer, great physical pain and mental anguish.

9. That as a result of the accident complained of herein, the Plaintiff was caused to expend, and he will in the future be caused to expend, large sums of money for medical expenses.

10. That as a result of the accident complained of herein, the Plaintiff was caused to be unable, and will in the future be unable, to perform his necessary and lawful affairs.

WHEREFORE, Plaintiff DEMANDS A TRIAL BY JURY and prays for judgment against the Defendant in the sum of One Million Two Hundred Fifty Thousand Dollars (\$1,250,000.00).

ROBERT T. GOODE,
JR.

By /s/ Eddie W. Wilson
Of Counsel

By /s/ Richard J. Tavss
Of Counsel

By /s/ Bruce A. Wilcox
Of Counsel

Eddie W. Wilson
MILLER, BONDURANT & WILSON, LTD.
706 London Boulevard at Green Street

JA-16

Portsmouth, Virginia 23704

Richard J. Tavss
Tavss & Fletcher
Two Commercial Place
Norfolk, VA 23510

Bruce A. Wilcox
Tavss & Fletcher
Two Commercial Place
Norfolk, VA 23510

**VIRGINIA: IN THE CIRCUIT COURT OF
THE CITY OF NORFOLK**

DOCKET NO. L-86-335

ROBERT T. GOODE, JR.,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY CO.,

Defendant.

MOTION TO DISMISS

Defendant, Norfolk and Western Railway Co., moves the Court to dismiss this action on the grounds that the Court is without jurisdiction of the subject matter, Congress having vested exclusive jurisdiction in the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C.A. § 901, *et seq.*

NORFOLK & WESTERN RAILWAY CO.

By /s/ John Y. Richardson, Jr.
Of Counsel

GROUNDS OF DEFENSE

Defendant, Norfolk and Western Railway Co., for its grounds of defense to the motion for judgment filed herein, comes and says:

1. That the allegations of paragraph 1 of the motion for judgment are admitted.
2. That the allegations of paragraph 2 of the motion for judgment are denied.
3. That the allegations of paragraph 3 of the motion for judgment are admitted.
4. That at the time of the accident complained of, plaintiff was engaged in maritime employment; defendant expressly requests a reply to this allegation of new matter.
5. That the accident and injury complained of occurred on the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel); defendant expressly requests a reply to the new matter alleged herein.
6. That with regard to the allegations contained in paragraph 4 of the motion for judgment, defendant admits plaintiff was injured on or about February 11, 1985 and was an employee of the defendant on that date, however, all other allegations are denied.
7. That the allegations of paragraphs 5, 6, 7, 8, 9 and 10 of the motion for judgment are denied.
8. That plaintiff was guilty of negligence which proximately caused or contributed to cause the action and the injuries complained of, and plaintiff failed to use due care to mitigate his damages. The plaintiff was not injured to the extent alleged and is not entitled to recover \$1,250,000.00 or any other sum in this action.

9. That plaintiff has waived his rights to proceed against the defendant by his acceptance of benefits under the Longshoremen's and Harbor Worker's Compensation Act and has made a binding election of remedies.

10. That defendant reserves the right to amend its grounds of defense during discovery of this matter or at trial.

NORFOLK & WESTERN RAILWAY CO.

By /s/ John Y. Richardson, Jr.
Of Counsel

Edward L. Oast, Jr.
John Y. Richardson, Jr.
Williams, Worrell, Kelly & Greer, P.C.
600 United Virginia Bank Building
Norfolk, VA 23510

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to Eddie W. Wilson and Richard J. Tavss, this 13th day of March, 1986.

/s/ John Y. Richardson, Jr.

PRESENT: All the Justices
OPINION BY JUSTICE RICHARD H. POFF
March 4, 1988

Record No. 841743

NANCY J. SCHWALB

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

FROM THE CIRCUIT COURT OF THE
CITY OF NEWPORT NEWS
Douglas M. Smith, Judge

Record No. 850728

WILLIAM MCGLONE

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

FROM THE CIRCUIT COURT OF THE
CITY OF PORTSMOUTH
Lester E. Schlitz, Judge

In this appeal, we review two judgments entered in separate actions, each sustaining a plea to the jurisdiction. Claiming damages for personal injuries, each plaintiff had invoked the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982) (FELA). In each appeal, the sole issue is

whether the plaintiff was a statutory employee as defined in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1982) (LHWCA or the Act). If so, the parties agree that the remedy provided by the Act is exclusive, *see* 33 U.S.C. § 905(a) (1982), and that we should affirm the judgments.

The two plaintiffs are Nancy J. Schwalb and William C. McGlone. Each was an employee of the defendant, The Chesapeake and Ohio Railway Company. Although the accidents resulting in the plaintiffs' injuries occurred at different times, the facts in the two cases, insofar as relevant to the issue common to the two appeals, are substantially identical. Each plaintiff was employed as a laborer to perform housekeeping and janitorial services in the offices, shops, bathrooms, and other places situated on the defendant's pier and adjacent property in Newport News. This property is equipped with facilities designed to transfer coal from railroad cars to ships moored at the pier. A "dumper", activated by "trunnion rollers", upends railroad cars and dumps the coal into "hoppers". The coal falls from the hoppers onto conveyor belts that carry it to a "loading tower" from which it is poured into the hold of a ship.

Coal spilled on the trunnion rollers can cause the dumpers to malfunction. Coal falling and accumulating beneath the conveyor belts eventually may damage the belts and interrupt the loading process. As part of the duties assigned by the defendant, the plaintiffs were required to clear away coal spilled in these areas. Because they were not members of a longshoremen's union, the plaintiffs were forbidden to load that coal onto the conveyor belts. The plaintiff McGlone was clearing away coal beneath a conveyor belt at the time he was injured. The plaintiff Schwalb was injured in a fall as she was walking along a "catwalk" approaching the trunnion rollers.

The parties in both cases agree that the defendant railroad is a statutory employer as defined in the LHWCA, that is, an employer "any of whose employees are employed in maritime employment, in whole or in part". 33 U.S.C. § 902(4) (1982). The plaintiffs' contention is that the trial courts erred in ruling that they were statutory employees as defined in the Act. The plaintiffs rely upon our decision in *White v. N. and W. Ry. Co.*, 217 Va. 823, 232 S.E.2d 807, *cert. denied*, 434 U.S. 860 (1977). Reviewing a judgment based on such a ruling, we applied the Act as amended in 1972, Pub. L. No. 92-576, 86 Stat. 1251, to the facts in *White*. First enacted in 1927, Pub. L. No. 69-803, 44 Stat. (part 2) 1424, the LHWCA was the first successful congressional response to the Supreme Court's decision in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). There, the Court had ruled that a state worker's compensation act could not constitutionally apply to a longshoreman injured in an accident that had occurred on a gangplank between a pier and a ship. Initially, Congress sought to authorize states to extend their workers' compensation statutes seaward of the *Jensen* line, but the Court held the state statutes to be unconstitutional delegations of congressional power. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924).

Although the federal Act filled a workers' compensation void, the LHWCA, as originally enacted, provided coverage only when "disability or death result[ed] from an injury occurring upon the navigable waters of the United States". 33 U.S.C. § 903(a) (1927). Federal compensation coverage stopped at the *Jensen* line; the Act did not apply to a longshoreman injured at work on a pier, even though engaged in traditional longshoremen's functions. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 218-20 (1969).

The 1972 amendments to the LHWCA moved the *Jensen* line landward to include areas adjoining navigable waters and "customarily used by an employer in loading, unload-

ing, repairing, or building a vessel". 33 U.S.C. § 903(a) (1982). Yet, Congress did not extend federal coverage to every worker injured in such areas, for it added an amendment defining a covered employee as "any person engaged in maritime employment." 33 U.S.C. § 902(3) (1982). The effect of the two amendments was to create a two-pronged coverage test—the situs of the injury and the status of the injured worker.

In *White*, a railroad employee filed a claim under FELA. He had been injured on a situs covered by the LHWCA, and "the critical question presented . . . [was] whether plaintiff was a 'person engaged in maritime employment' and thus an 'employee' within the meaning of the Act." 217 Va. at 827, 232 S.E.2d at 809. White was hired as an electrician to maintain and repair the electrical equipment used at a pier to dump coal from railroad cars, to move conveyor belts transporting the coal, and to load the coal into ships. Although White did not operate any of the equipment employed in the loading process, the railroad argued that "all of his activity was 'functionally related' to the loading of coal on ships", *id.* at 831, 232 S.E.2d at 812, and that he was, therefore, an employee engaged in maritime employment and, as such, was limited to the remedy provided by the LHWCA.

In *White*, the railroad had borrowed the "functional relationship" formula from the opinion in *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation*, 540 F.2d 629, 637-38 (3d Cir. 1976). Considering the history of the Act and construing the congressional intent underlying the 1972 amendments, we rejected that formula. We adopted, instead, the standard articulated in *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 961 (9th Cir.), cert. denied, 429 U.S. 868 (1976):¹

¹ The Supreme Court disapproved application of a significant relationship standard to determine the status of the worker in *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 302 n.8, 318-

[F]or an injured employee to be eligible for federal compensation under [the Act], his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters,' with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in § 903.

Applying the *Gilmore* standard, we said that "we do not believe plaintiff's duties . . . had a realistically significant relationship to the loading of cargo on ships", that "plaintiff was not a covered 'employee' within the meaning of the Act", and that "the order dismissing plaintiff's FELA action will be reversed". 217 Va. at 832-33, 232 S.E.2d at 813.

In the appeals at bar, the defendant railroad relies on *Price v. Norfolk & W. Ry. Co.*, 618 F.2d 1059 (4th Cir. 1980). There, the plaintiff in an FELA action was a painter employed by the defendant railroad. He sustained an injury while painting the support towers of a structure housing a conveyor belt system used in loading grain into the hold of a vessel. The *Price* court reasoned that, because "the failure to paint would eventually lead to severe rusting that would halt the entire [loading] process", *id.* at 1062 n.4, the plaintiff was engaged in maritime employment and, consequently, "was an 'employee' within the meaning

19 (1983). The Court did not, however, disapprove a significant relationship standard as a concept when applied, as in *Gilmore*, to post-1972 coverage landward of the *Jensen* line. As noted by the majority in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 424 n.10 (1985) (quoting *Perini*, 459 U.S. at 299, 324 n.34) the decision in *Perini* "was carefully limited to coverage of an employee 'injured while performing his job upon actual navigable waters' . . . [and] was, 'of course,' limited to workers covered prior to 1972".

of the LHWCA which provides an exclusive remedy", *id.* at 1062.

We cannot agree that Congress intended the 1972 amendments to have such pervasive and preclusive effects. Nor do we agree with the argument advanced by the railroad in these appeals that the Supreme Court implicitly has overruled our decision in *White*. On brief, the defendant says that "the U.S. Supreme Court has stated that one is engaged in maritime employment if he is 'engaged in the *overall* process of loading and unloading vessels' (emphasis supplied)." For this proposition, the defendant cites *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). The language the defendant quotes from that decision is an abbreviated excerpt lifted from a longer passage, the import of which we construe differently.

The injuries at issue in *Caputo* were sustained during the process of unloading a ship. Considering the reports of the congressional committees that initiated the 1972 amendments, the Court concluded that Congress intended

to cover those workers involved in the *essential elements* of unloading a vessel—taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area [P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truck drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered. Also excluded are employees who perform purely clerical tasks and are not engaged in the handling of cargo.

Id. at 267 (emphasis added). As we construe this language, the Court reasoned that, although clerical employees working on a covered situs may have responsibilities related to

the commercial process, unless they are "engaged in the handling of cargo", they are not "involved in the essential elements of [loading or] unloading a vessel" and, therefore, are not statutory employees for purposes of the LHWCA. *Id.*

We recognize that the Act is remedial in purpose and, as the defendant says, that "*Caputo* requires an expansive view of LHWCA". We note, however, that the Court speaks of covered workers as those "involved in the essential elements of unloading a vessel", *id.*; as those "directly involved in the loading or unloading functions", *id.* at 271 (quoting S. Rep. 1125, 92d Cong., 2d Sess. 13 (1972) and H.R. Rep. 1441, 92d Cong., 2d Sess. 11 (1972)); and as those who "spend at least some of their time in indisputably longshoring operations", *id.* at 273. Two years following *Caputo*, the Court said that "workers doing tasks traditionally performed by longshoremen are within the purview of the 1972 Act." *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 82 (1979). And the Supreme Court, recalling the language of *Caputo*, emphasized in its most recent analysis of the status test that the purpose of the maritime employment requirement was "to cover those workers on the situs who are involved in the *essential elements* of loading and unloading". *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 (1985) (emphasis added).

We believe the "essential elements" standard is more nearly akin to the "significant relationship" standard we adopted in *White* than the "overall process" construction invoked by the defendant. In this respect, we see no logical difference between workers "who perform purely clerical tasks", *Caputo*, 432 U.S. at 267, and workers who perform purely maintenance tasks, such as painting, or workers who, like the plaintiffs in these appeals, perform purely housekeeping and janitorial tasks.

Applying the rule in *White*, we hold that the plaintiffs were not statutory employees as defined in the LHWCA.

We will reverse the judgments dismissing the plaintiffs' FELA actions and remand the cases for trials on the merits.²

Record No. 841743 - Reversed and remanded.

Record No. 850728 - Reversed and remanded.

² In the Schwalb appeal, the defendant argues that the plaintiff "is estopped from denying LHWCA coverage" because she accepted compensation paid under the Act. According to the defendant's brief, "[s]he expresses no agreement to off-set compensation payments previously received against any recovery under FELA and, therefore, double recovery remains a possibility." But, in a memorandum of law filed in the trial court, we find that the plaintiff acknowledged that "any recovery by plaintiff on her FELA claim will be reduced by the amount of LHWCA benefits she may have already received." A railroad worker who makes such a concession does not seek a double recovery and is not precluded from pursuing a remedy under FELA. *Freeman v. Norfolk and Western Ry. Co.*, 596 F.2d 1205, 1208 (4th Cir. 1979); accord *Caldwell v. Ogden Sea Transport, Inc.*, 618 F.2d 1037, 1049 (4th Cir. 1980).

SEVENTH JUDICIAL CIRCUIT OF VIRGINIA
Newport News, Virginia 23607

August 8, 1984

Ms. Frances S.P. Li
Suite 565
608 2nd Avenue South
Minneapolis, Minnesota 55402

Mr. William W. Nexsen
Stackhouse, Rowe & Smith
P. O. Box 3570
Norfolk, Virginia 23514

Mr. Richard Wright West
West, Stein, West & Smith
P. O. Box 257
Newport News, Virginia 23607

Re: Nancy J. Schwalb v. The Chesapeake and Ohio Railway Company At Law No. 8827

Dear Counsel:

You will recall that on June 6, 1984, the Court heard argument on a special plea to jurisdiction in the above captioned cause. This special plea was filed by the defendant C&O, in which they contend that the plaintiff's sole remedy in this cause is under LHWCA and consequently this court lacks jurisdiction on the motion for judgment.

The Court heard evidence of witnesses, stipulations by counsel, has read the memorandums of law and cases cited therein and am rendering my decision by this letter.

The plaintiff and defendant both agree that to be covered under LHWCA an injured employee must meet both a situs and a status test, both sides agree that the situs

test has been met. This leaves as the only question involved whether or not the plaintiff employee is engaged in maritime employment and the Court holds that the plaintiff Schwalb is so engaged, as her duties were essential to the loading and unloading of coal by conveyor belt to the ships moored at the docks. It is uncontradicted that if the spilled coal was not removed that it could have halted the process of loading the coal aboard the vessels. With the liberal interpretations expressed in decisions by the United States Supreme Court this Court has no difficulty in determining that the plaintiff's remedy is under the LHWCA. Therefore, the plea to the jurisdiction is sustained and I am requesting Mr. West to draw the appropriate order, noting plaintiff's exception and objection and having the order endorsed by opposing counsel and returning to the Court for entry.

Very truly yours,

/s/ Douglas M. Smith
Judge

**THIRD JUDICIAL CIRCUIT
Circuit Court of the City of Portsmouth**

May 29, 1985

Richard Wright West, Esquire
P.O. Box 257
Newport News, Virginia 23607
Russell N. Brahm, III, Esquire
P.O. Box 1138
Portsmouth, Virginia 23705-1138

**Re: William McGlone v. Chesapeake and Ohio Railway
Co. L84-327**

Gentlemen:

Thank you for your excellent and most exhaustive memoranda. I have reviewed the pleadings, the evidence and the argument of counsel, and I have read the memoranda and all *c^e* the cases cited.

William McGlone, plaintiff, was injured at Newport News, Virginia, on February 1, 1983, and filed his Motion for Judgment against the Chesapeake and Ohio Railway Company, defendant, on May 31, 1983, under the Federal Employer's Liability Act (FELA), 45 U.S.C. 51, *et. seq.* Defendant filed a special plea to the jurisdiction on June 24, 1983, on the ground that plaintiff's sole and exclusive remedy upon the matters alleged in the Motion for Judgment is under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 905(a).

A hearing on the special plea was heard by this Court on March 29, 1985, evidence taken and a transcript prepared. It appears from the evidence that plaintiff and employee of the Chesapeake and Ohio Railway Company on the date of the accident was working on the pier as a laborer cleaning up coal which had fallen from a conveyor

belt which was being used to load coal onto a ship at the pier. The hopper and conveyor belt is an extension of the pier. If coal is not removed in the area where the plaintiff was cleaning up, the coal would eventually interfere with the loading operation and bring it to a halt. This work was frequently done by the plaintiff. Plaintiff was injured by the conveyor belt while engaged in this work. The sole action involved here is whether the plaintiff at the time of his injury was working in a maritime capacity as defined by the LHWCA.

An injured employee must meet both a "situs" and a "status" test in order to be covered under LHWCA. There seems to be no question here that the injured [sic] occurred in a covered situs but we must determine whether plaintiff occupied a status covered under LHWCA. *Noqueira v. New York, N.H., and H.R. Company*. 281 U.S. 128, (1930).

The Court must resolve a conflict in the case law between a decision of the Supreme Court of Virginia, *White v. Norfolk & Western Railway Co.*, 217 Va. 823 (1977), *cert. denied*, 434 U.S. 860 (1977) and *Price v. Norfolk & Western Railway Company*, 618 F2d 105 (1080) [sic], decided by the Fourth Circuit Court of Appeals. In *White* the court stated at page 832:

"Plaintiff was not actually handling any cargo either manually or mechanically, as was the case in the decisions principally relied on by N & W. Moreover, plaintiff was not manipulating (except to test) any of the controls of the electrical mechanism, which furnished the power for this automated loading process. Rather, he was only maintaining the electrical device on the shore and attached to the pier, work which is not the traditional work of a ship's service employee. Plaintiff was at least one step removed from a realistically significant relationship and from a direct involvement with the loading of vessels.

The mere fact that some of the plaintiff's cumulative injury was sustained out over the Elizabeth River while he worked inside the electrical rooms of the Pier 6 ship loaders, does not convert his status from that of a railroad electrician to that of a maritime worker."

It can thus be seen that the Virginia Supreme Court held that to qualify as an employee under LHWCA the plaintiff must have been directly involved in the loading of coal. Under this ruling plaintiff could not have been held to be an employee under LHWCA.

Price decided three years after *White* holds to the contrary.

The Fourth Circuit held that a railway employee who was injured while painting towers used in the loading of ships was an employee under LHWCA. The court held that merely because the employee was not directly involved in the actual loading of ships, this fact did not remove him from coverage under LHWCA because the maintenance of the towers was essential to the movement of maritime cargo and thus the employee was included in the broad concept of maritime employment.

This view has been upheld in many Federal court decisions. *See: Newport News Shipbuilding and Drydock Company v. Graham*, 573 F2d 167 (4th Circuit), cert. denied, 439 U.S. 979, 99 S.Ct. 563 (1978); *Northeast Marine Terminal Company v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348 (1977).

It will thus be seen that the Fourth Circuit has adopted a broad concept of maritime employment that maintenance of maritime cargo loading equipment is essential to the loading of cargo and is, therefore, included in the meaning of a person engaged in maritime employment under LHWCA.

White stands alone in contrast to the federal decisions which were decided after the decision in *White*.

Should this court blindly follow *White* because it is a State court decision, under the principle of *stare decises*? To do so would be to interpret a Federal law contrary to all of the decisions of the Federal courts which have declined to follow *White* and have disagreed with its results. It is the Court's belief that this conflict between the Supreme Court of Virginia and the Fourth Circuit Court of Appeals must be resolved in favor of the latter decisions of the federal courts and this Court reluctantly and respectfully declines to follow *White* since it feels the decision in *Price* is now controlling.

The Court is of the opinion that the plaintiff in this case, under the facts presented, was engaged in activity which made him an employee under the meaning of LHWCA, and that he is precluded from maintaining a FELA action in this case.

Defendant's special plea to the jurisdiction of this Court is sustained, and the plaintiff's Motion for Judgment will be dismissed from the docket.

Counsel for the defendant will prepare and circulate a sketch order in accordance with this letter and for presentation to the Court for entry.

Sincerely yours,

/s/ Lester E. Schlitz
Chief Judge

**FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK**

November 13, 1986

Eddie W. Wilson, Esquire
2200 Colonial Avenue, Suite 12-B
P. O. Box 11168
Norfolk, Virginia 23517

John V. Richardson, Jr., Esquire
Williams, Worrell, Kelly & Greer
600 United Virginia Bank Building
P. O. Box 3416
Norfolk, Virginia 23514-3416

**Re: Robert T. Goode, Jr. vs. Norfolk and Western Rail-
way Co. At Law No. L-86-335**

Gentlemen:

Thank you for the help that you have given the court. I have studied all of the material supplied, including the opinions cited in your excellent briefs.

If this case were one of first impression, I would be tempted to rule that Congress, by enacting the Longshoremen's and Harbor Workers' Compensation Act (L.H.W.C.A.), did not intend to strip a railroader of any of his benefits under the Federal Employer's Liability Act (F.E.L.A.) under any circumstances so long as he was working for the railroad at the time of injury, a narrow, unintellectual approach which makes good sense.

The duty of this court, however, is not to make law but to interpret and follow the law as set forth by courts of higher dignity. In following that duty, I feel that I am directed by the existing law to rule that, under the particular facts of this case, the motion for judgment must

be dismissed for reason that exclusive jurisdiction lies within the ambit of the L.H.W.C.A.

Railroad cars filled with coal come cross country in both interstate and intrastate commerce and come to rest in what is called the barney yard located near pier 6 at the Lambert's Point terminal in Norfolk, Virginia. After the coal has come to rest in the barney yard, the process of loading the coal into vessels begins. The loaded cars are moved from the barney yard through a thawing shed, and are then pushed up a raised track by small locomotives called pushers onto the dumper located near the piers. As these loaded cars are pushed on to the dumper, their progress is slowed or stopped by equipment known as a retarder. The cars revolve, dumping the coal onto conveyor belts which deliver the dumped coal directly into the holds of waiting vessels docked at the piers. The empty cars are pushed to the apex of the raised track and then, through the force of gravity, are returned to a holding yard from where they will again be dispatched to coal fields located in various parts of the country.

The plaintiff was a machinist who was injured while repairing the retarder on the dumper located near pier 6. The dumper and retarder on which the plaintiff was working are located 500 to 550 feet from the water. Retarders are located throughout the railroad system; however, the sole purpose of this retarder was to stop the loaded cars on the dumper to facilitate the transportation of coal from shore to vessel by dumping the coal on conveyor belts which feed the coal into the belly of docked vessels at pier 6. The entire loading operation at pier 6 must cease when the retarder is inoperative or is being repaired, and the loading operation had in fact ceased at the time of the injury to the plaintiff.

Machinists may be assigned to what is known as the Motive Power Department which has the function of maintaining and operating the coal dumping facility of the rail-

road. Machinists may be assigned to different locations such as the 38th Street car shop or the roundhouse, which may be miles away from the water, or they may be assigned to Lambert's Point. The location is determined by seniority, and a machinist working at the pier at Lambert's Point may be forced to work at another location because of the electing of a more senior machinist to work at the pier. At the time of the accident, the plaintiff had been assigned for some time to work at Lambert's Point. While assigned to Lambert's Point, machinists spend the overwhelming portion of their working time maintaining and repairing machines and equipment essential to the coal dumping operation. Machinists do not, for example, regularly repair cars for that is the job of the train men. The great majority of the working time of a machinist while assigned to Lambert's Point is spent on the maintenance and repair of machinery which facilitates the dumping operation after the cars have left the barney yard. The machinists are required to pay into the railroad retirement plan and are subject to the Railway Labor Act.

Under the facts of this case, the railroad is an employer within the meaning of the L.H.W.C.A., *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128, 132, 44 L.Ed. 754, 50 S.Ct. 303 (1930), and the plaintiff is an employee within the meaning of the L.H.W.C.A., *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 53 L.Ed. 2d 320, 97 S.Ct. 2348 (1977); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 62 L.Ed. 2d 225, 100 S.Ct. 328 (1979), and he cannot walk in and out of coverage because, I believe, that the overwhelming portion of his work is essential to the loading and unloading operation.

The Supreme Court in *Herb's Welding v. Gray*, ____ U.S. ___, 84 L.Ed. 2d 406 (1985), while holding that a welder working on a fixed offshore oil-drilling platform was not engaged in maritime employment within the meaning of L.H.W.C.A., has stated:

But Congress did not seek to cover all those who breathe salt air. Its purpose was to cover those workers on the situs who are *involved* in the *essential elements* of loading and unloading. (Emphasis added).

We have never read 'maritime employment' to extend so far beyond those *actually involved in moving cargo between ship and land transportation*. (Emphasis added).

On the facts of this case, I hold that the plaintiff was involved in the essential elements of loading and unloading and that he was actually involved in moving cargo between ship and land transportation. After all, the entire loading operation ceased during the repair of the retarder on which the plaintiff was working when injured. The location of the retarder was on the dumper, and the sole purpose of this particular retarder was to stop coal-loaded cars so that the coal could be dumped onto the belts feeding the vessel. It must be remembered that plaintiff's supervisors testified that 99 percent of the work of a machinist assigned to Lambert's Point was the maintenance and repair of machines and equipment directly and solely related to the loading and unloading operation. Even the most biased witnesses could not seriously testify that less than 50 percent of the work was not so related, while the machinist was assigned to Lambert's Point.

The plaintiff places a great deal of emphasis on *White v. N & W. Ry. Co.*, 217 Va. 832 (1977), decided in the same year as *Conti v. N. & W. Ry. Co.*, 566 F.2d 890 (4th Cir.).

It is my belief that, under the facts of this case, the plaintiff did have "a realistically significant relationship to the loading of cargo on ships" and that he was directly involved in the process of loading coal on the vessels within the meaning of the *White* test. Furthermore, this case does involve a federal question, the federal authorities are

therefore the more persuasive, and to the extent that *White* differs from significant federal decisions, the *White* court, in my opinion must yield.

As counsel well know, there have been a number of significant decisions subsequent to *White*, one of the leading decisions being *Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059 (4th Cir.1980). In my opinion, the *Price* court did set forth the proper test in determining whether there is exclusive coverage under the L.H.W.C.A., that test being whether the plaintiff's job was an essential element in the loading and unloading of the vessels. I hold that in this case the plaintiff's job was an essential element, although in light of the later ruling in *Herb's Welding*, *supra*, I would not hold that the painter's job in the *Price* case was an essential element.

I believe that *Newport News Shipbuilding & Dry Dock v. Graham*, 573 F.2d 167 (4th Cir.), cert. den., 439 U.S. 979, 58 L.Ed. 2d 649, 99 S.Ct. 563 (1978), fortifies my opinion in this case, and I do not think that this opinion is in substantial conflict with *Conti v. N. & W. Ry. Co.*, 566 F.2d 890 (4th Cir. 1977), although I do agree with the D.C. Circuit Court that even before *Herb's Welding*, *supra*, the Fourth Circuit had moved away from a test of balancing traditional railroad tasks against traditional maritime tasks. *Harmon v. Baltimore & Ohio RR.*, 741 F.2d 1398 (D.C. Cir 1984).

I am cognizant of my colleague's decision in *Evans v. N. & W. Ry. Co.* (Norfolk Circuit Court 1985), but likewise do not feel that we are in conflict. After a close reading of his decision, I believe that, under the facts of this case, Judge Clarkson would have reluctantly reached the same decision which I have reluctantly reached.

With regard to the situs test, I hold that the most important factor is the nature of the work rather than the distance from the water and that the test has been met. *Graham, supra; Prolerized New England Co. v. Miller*, 691

F.2d 45 (1st Cir. 1982); *Prolerized New England Co. v. Ben. Rev. Bd.*, 637 F.2d 30 (1st Cir. 1980), cert. den. 452 U.S. 938, 101 S.Ct. 3080, 69 L.Ed. 2d 952 (1981); *Sea-Land Serv. v. Director, etc.*, 685 F.2d 1121 (9th Cir. 1982); *Garvey Grain Co. v. Director, etc.*, 639 F.2d 366 (7th Cir. 1981).

I commend both counsel for their thorough preparation for the hearing and their excellent briefs.

Mr. Richardson may prepare the order for Mr. Wilson's endorsement. Please have the order forwarded to me prior to November 19, 1986, if possible.

Very truly yours,

Charles R. Waters, II
Judge

**VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF NEWPORT NEWS**

LAW NO. 8827-S

NANCY J. SCHWALB,

Plaintiff,

vs.

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
A CORPORATION,**

Defendant.

O R D E R

On June 6, 1984 came the parties and their attorneys, and the Court heard evidence and the argument of counsel upon the defendant's Special Plea To Jurisdiction. And having further considered the memoranda of the parties and having maturely considered the same, the defendant's Special Plea to Jurisdiction is SUSTAINED for the reasons more fully set forth in the Court's letter opinion of August 8, 1984.

Accordingly, this action is DISMISSED with prejudice to the plaintiff.

**DATE: 8-22-84
ENTER:**

/s/ D.M. Smith
Judge

I ask for this:

/s/ Richard Wright West
Counsel for Defendant

Seen and exception noted:

/s/ William W. Nexsen
Counsel for Plaintiff

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF PORTSMOUTH
ON THE 13TH DAY OF JUNE, 1985.

—
LAW NO. L-83-327
—

WILLIAM C. McGLONE,

Plaintiff,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

Defendant.

O R D E R

On March 29, 1985 came the parties and their respective attorneys, and the Court heard evidence and the argument of counsel upon the defendant's Special Plea to Jurisdiction. And having further considered the Transcript of the hearing conducted on March 29, 1985, the memoranda of the parties, and having maturely considered the same, the defendant's Special Plea to Jurisdiction is SUSTAINED for the reasons more fully set forth in the Court's letter opinion of May 29, 1985.

Accordingly, this action is DISMISSED with prejudice to the plaintiff. It is further ORDERED that the Transcript of the evidentiary hearing be made part of the Record in this case pursuant to Rule 5:9 of the Rules of Court.

JA-42

DATE:
ENTER: 6-13-85

/s/ W.H.O.
Judge

I ask for this:

/s/ Richard W. West
Counsel for Defendant

Seen and exception noted:

/s/ Russell N. Brahm III
Counsel for Plaintiff

**VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF NORFOLK**

Docket No. L-86-335

ROBERT T. GOODE, JR.,

Plaintiff.

v.

NORFOLK & WESTERN RAILWAY CO.,

Defendant.

ORDER

This day came the parties to this action, by counsel, pursuant to defendant's Motion to Dismiss on the basis that Congress has vested exclusive jurisdiction over this matter in the Longshoreman's and Harbor Workers Compensation Act, counsel having fully argued and briefed defendant's motion. The court has fully considered the evidence presented, the briefs and arguments of counsel and has filed its letter opinion dated November 13, 1986 which is incorporated by reference.

For the reasons set forth in the opinion letter, it is accordingly ORDERED that the motion be granted, and it is accordingly ORDERED that this action be DISMISSED WITH PREJUDICE, the plaintiff's exceptions being so noted.

Enter this Order: 12/17/86

/s/ Charles R. Waters, II
Judge

I ask for this:

/s/ John Y. Richardson, Jr. p.d.

Seen and Exceptions Noted:

/s/ Eddie Wilson p.q.

/s/ Bruce A. Wilcox p.q.

Filed March 4, 1988

SUPREME COURT OF VIRGINIA

Record No. 841743
Circuit Court No. L-8827-S

NANCY J. SCHWALB,

Appellant,
against

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Newport News on the 22nd day of August, 1984.

For reasons stated in writing and filed with the record, the Court is of opinion that the judgment appealed from is erroneous. Accordingly, the judgment is reversed and annulled, and the case is remanded to the said circuit court for trial on the merits.

This order shall be certified to the said circuit court.

A Copy,
Teste:

/s/ David B. Beach
Clerk

Filed March 4, 1988
SUPREME COURT OF VIRGINIA

Record No. 850728
Circuit Court No. L-83-327

WILLIAM McGLONE,

Appellant,
against

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Portsmouth on the 13th day of June, 1985.

For reasons stated in writing and filed with the record, the Court is of opinion that the judgment appealed from is erroneous. Accordingly, the judgment is reversed and annulled, and the case is remanded to the said circuit court for trial on the merits.

This order shall be certified to the said circuit court.

A Copy,
Teste:

/s/ David B. Beach
Clerk

April 22, 1988
SUPREME COURT OF VIRGINIA

Record No. 870252
Circuit Court No. L86-335/L2341-86

ROBERT T. GOODE, JR.,

Appellant,
against .

NORFOLK & WESTERN RAILWAY COMPANY,

Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Norfolk on the 17th day of December, 1986.

Upon consideration of the record and briefs, and on the basis of *Schwalb v. C & O Railway Co.*, 235 Va. ___, ___ S.E.2d ___ (1988), the Court is of opinion that the judgment appealed from is erroneous. Accordingly, the judgment is reversed and annulled, and the case is remanded to the said circuit court for trial on the merits.

This order shall be certified to the said circuit court.

A copy,
Teste:

David B. Beach, Clerk

By: /s/ Cynthia L. McCoy
Deputy Clerk

33 U.S.C.A. § 902 (West 1986).

Definitions

When used in this chapter—

* * *

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include—

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. § 902(3) (as amended in 1972 by Pub. L. 92-576 but prior to the 1984 Amendments, Pub. L. 98-426)

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C.A. § 905 (West 1986). *Exclusiveness of liability*

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcon-

tractor fails to secure the payment of compensation as required by section 904 of this title.

• • •

45 U.S.C.A. § 51 (West 1986). Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

• • •

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF NEWPORT NEWS

—
LAW NO. 8827-S
—

NANCY J. SCHWALB,

Plaintiff,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Newport News, Virginia

June 6, 1984

Before:

HONORABLE DOUGLAS M. SMITH, JUDGE

[T:3] (The Court Reporter was duly sworn.)

Court: All right, who is the attorney representing Miss Schwab?

WILLIAM W. NEXSEN, appearing for defendant.

Mr. Nexsen: Judge, I'm Bill Nexsen; I'm with the firm of Stackhouse, Rowe and Smith in Norfolk, and local counsel, and today we have Miss Frances Li, Frances with an E-S, Li with an L-L. Of the firm DeParcq, Perl, Hunegs, Rudquist and Koenig out of Minneapolis.

We would move her entrance pro hac vice for this purpose only. She would be lead counsel and would represent Miss Schwab.

FRANCES S.P. LI, appearing for plaintiff.

Ms. Li: Thank you, your Honor.

Court: What's your last name please?

Mr. Nexsen: Mine?

Court: Yes.

Mr. Nexsen: Nexsen, N-E-X-S-E-N.

Court: All right, Mr. West, we're here on your motion, I believe in the special plea to the jurisdiction.

Mr. West: Yes sir.

Court: You want to call some witnesses?

Mr. West: Yes sir, Mr. Overman, Mr. Gross, Mr. McCarthy.

[T:4] Court: Come up, please.

(At this time, the witnesses were duly sworn.)

Court: You all want to separate them?

Mr. West: I don't care. Mr. McCarthy is the company representative. Mr. Overman is my first witness.

Court: Have a seat.

Mr. West: I don't know whether the Court wants any opening comment.

Court: Yes, you might make an opening, please.

Mr. West: We anticipate proving to the Court that Miss Schwalb, who was a laborer in the Mechanical Department in the C and O working in Newport News, that on the date of her accident, she would have been or is covered under the Longshoremen and Harbor Workers Compensation Act. I don't know how much dispute we have as to everything the C and O is required to prove under that act.

The last hearing we had was on the fourth floor in a similar type case and the Plaintiff stipulated that in that case, he was employed by the C and O on the date of the

accident. I don't anticipate there's any problem with that. They conceded that the C and O was an employer, as defined in the act, and the fourth concession was [T:5] that the accident happened upon navigable waters of the United States, how that is defined in the Longshoremen and Harbor Workers' Compensation, I'm prepared to prove all three of them, plus of course the major problem in dispute here is whether she was an employee under the act, particularly I believe according to the status test.

Court: All right.

Mr. West: We're prepared to prove it all.

Ms. Li: We would stipulate the act, C and O was an employer under the Longshoreman's Act at the time of the accident, and we would stipulate too the Plaintiff was injured at the time of the accident, she was employed by the Defendant, C and O, and her injury was in the course of her employment.

However, we would not stipulate to the fact that the accident happened on navigable waters nor will we stipulate to the fact that she was a maritime employee.

Court: All right.

Mr. West: With that in mind then, the C and O will produce evidence as to both tests, the status test and the situs test as it comes under Section 905(a) of the Title 33 of the US Code.

Our evidence will show as a laborer, most of Miss Schwalb's job was to clean out coal, spilled coal from underneath the belts that take the coal from the [T:6] dumpers out to the ships. We will have some photographs to show the Court, show you the relationship of the relationship of the dumpers to the ships. The coal cars are brought into Newport News and down to the dumper where they are turned upside down, the coal falls into a hopper on to belts and the belts transport the coal out to a tower

where they are put aboard ships. This is, the dumper we're talking about is part of the Pier 14 complex at Newport News and Miss Schwalb, at the time of her injury was on the way to clean out coal from under, what are referred to as trunnion rollers; trunnion rollers are what permit the dumper to turn upside down with a car inside of it.

And the coal, which accumulates in the vicinity of the trunnion rollers is not removed, the dumper is not going to turn upside down and the coal loading operation will have to cease.

We will also produce evidence with regard to what Miss Schwalb's job normally was, how much time she would normally spend in various types of activities and we anticipate also producing evidence to show that Miss Schwalb has received to date from the C and O, or at least through the end of May, \$20,409.12 paid to her bi-weekly under the Longshoremen and Harbor Workers' Compensation Act, and other matters relating to her coverage under that act which is administered by the US Department of [T:7] Labor.

Court: All right. Who is your first witness?

Mr. West: Mr. Overman.

Court: Mr. Overman.

M. L. OVERMAN, called as a witness by the Defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. West:

Q You're M. L. Overman?

A That's correct.

Q You're employed by the C and O?

A That's right.

Q In what capacity?

A Electrical foreman.

Q Mr. Overman, were you on duty on January 12, 1983 when Miss Schwalb was injured?

A Yes, I was.

Q In your position as foreman, which [T:8] department are you foreman of?

A Mechanical Department.

Q All right. Did Miss Schwalb come under you in the ordinary chain of command?

A Yes, she did.

Q Did you have occasion to talk to her on that evening when she came to work?

A I assigned her her task for the night.

Q Other than the fact that Miss Schwalb was to be furloughed at the end of that shift, was there anything that she was to do in the next eight hours from the beginning of her shift, that you would consider unusual or not typical of what she normally did when working in the area of the dumper and the pier?

A No.

Q What would you describe as Miss Schwalb's primary job as a laborer in the Mechanical Department working in the area of Pier 14?

A To clean spilled coal from under the belts, trunnion rollers, and off of the towers, loading towers.

Q On the—on January 12, 1983, did you receive a message that Miss Schwalb had been injured?

A I heard it on the radio.

[T:9]Q Did you then go to where she was.

A Yes.

Q Let me show you a photograph and ask you if you can identify what that depicts (indicating).

A Yes, this is a walkway between the hoppers leading to the trunnion rollers.

Q Is that where Miss Schwalb told you she had been injured?

A Yes.

Mr. West: We ask this be marked as Defendant's Exhibit Number One for purpose of this hearing.

(At this time, the photograph was received and marked as Defendant's Exhibit Number One.)

By Mr. West:

Q Now, let me show you two other photographs—let me ask you if you just recognize what's shown in those photographs?

A That's Pier 14, the dumper and tower. And the same here (indicating).

Mr. West: We ask these be marked.

(At this time, the two photographs were received and marked as Defendant's Exhibits [T:10] Numbers Two and Three.)

Mr. West: I ask that the one that has the B marked on it be marked as Defendant's Exhibit Number Two, and the following, Number Three.

Court: All right

By Mr. West:

Q All right, now for the benefit of the Court and Miss Li, if she would like to see, I'm going to show you what you have identified or what has been marked as

Defendant's Exhibit Number Two and you've identified as Pier 14. Can you show the Court where in that photograph is what is depicted in Defendant's Exhibit Number One. This walkway.

A Yes, it's here in the center of the dumper, center of the dumpers.

Q Would you show the Court where the dumpers are?

A Right here (indicating).

Court: Okay.

A This is the dumper.

Court: That's where it turns it, the car over?

A Yes. This is operator's cab and the walkway is right below it.

Court: Okay.

[T:11] By Mr. West:

Q The walkway is not shown in this photograph?

A No.

Q Underneath the dumper?

A Right.

Q When a car is brought up and turned upside down on the dumper, can you use Photograph Number Three and show the Court what happens to that coal?

A The coal flows by gravity down to feeders that—put it on to the main belts that run out the pier and up on the loading towers and into the ship.

Mr. West: That's all I have of Mr. Overman. Answer Miss Li, please.

CROSS EXAMINATION

By Ms. Li:

Q Mr. Overman, as for Miss Schwalb's primary duties, did you assign her part of that job, sweeping the floors of the office and the yard and other areas as well?

A It takes about 45 minutes in the morning before quitting time.

Q Would you describe the areas of the [T:12] sweeping that she was assigned to do?

A You mean the size of the area or where it is?

Q Where.

A It's the mechanical office that sits near the bulkhead and the shop is directly behind it.

Q Any other areas?

A There's three—the office and the shop and—ordinarily, the third shift laborer where she was working, would sweep out the office, and the eating area next to it. That's called the lunch—in the locker room. That's just before quitting time.

Q Her job as a laborer, that is an unskilled job, is that right?

A Yes, that's it basically.

Q And her duties did not involve the actual loading of coal, did it?

A Well, without her job, loading couldn't continue.

Q You didn't answer my question.

A All right.

Q Did it involve the actual loading of coal?

A No, no.

Q Did it involve the actual unloading [T:13] of coal?

A No.

Q Did her duties involve the operating of the loading machinery and equipment?

A No.

Q She was never required to go aboard the ship as part of her duties, is that right?

A Laborers have been, but she wasn't.

Q That's who I am directing my questions to. Miss Schwalb's duties.

A No.

Q She was never required to go aboard a ship?

A No.

Q Her primary duties then was general clean-up, is that right?

A Clean-up of trash coal. You see, we have other laborers that ordinarily clean the locker rooms and equipment. This is just something for general housekeeping before the next shift comes on.

Q Do you know which Union she belongs to?

A Unit?

Q Union.

A Union?

[T:14]Q Yes.

A Laborers' Union.

Q Do you have the name?

A Oh, no.

Q That is not a Longshoremens' Union in any event, is that right?

A Not that I'm aware of.

Q She was governed by the same operating and safety rules that would govern other laborers in the C and O system, is that correct?

A Yes, I'd say so.

Q As foreman, who assigned duties to the laborers under the Mechanical Department, you would agree that keeping the facilities clean would be one of the functions of the C and O Railroad, is that right?

A Keeping the facilities clean?

Q Clean-up, yes.

A Yes.

Q That includes not only the piers, but the office, the yards, the junctions and areas in the railroad facilities, is that correct?

A Are you talking laborers in general, or her specific job?

Q I'm talking in general.

A In general, laborers do, yes.

[T:15]Q And this clean-up duties then is not unique to the pier area, is that right?

A Well, that's the only place they clean up trash coal.

Q Her duties did not include only cleaning up trash coal?

A Laborers can be assigned to various duties.

Q I understand that.

A For instance, one man is assigned, one laborer is assigned to just clean the locker rooms, but if a person is assigned to a certain section, each night or each shift, then that's his job for that shift.

Q The laborers' clean up duties that involved, they involved the whole facility, not only just on the pier?

Mr. West: I think—my problem is we're going back and forth from what Miss Schwalb's duties were as opposed to what a general laborer's duties is. I don't think Mr. Overman understands when the switch is made.

Court: Let's make it clear, when you're talking about laborers in general or talking about Miss Schwalb.

Ms. Li: I'm talking about clean-up duties in general. [T:16]A The clean-up duties of laborers are the position to which they are assigned.

By Ms. Li:

Q The clean-up duties of laborer include the whole facility, is that right?

A Just the Mechanical—the Mechanical Department laborers have an assigned section they clean. The transportation has their own laborers that clean other sections.

Q How far in terms of feet or yardage is the dumper from the shore line on water edge?

A Not more than three hundred foot, I would think.

Q And how far is the pier, specifically Pier 14, how long is that pier?

A Mr. Gross could probably could answer that. I really - I'd say probably 1200 foot, but that's a guess. I've seen it, but I can't remember.

Ms. Li: That's all I have. Thank you.

REDIRECT EXAMINATION

By Mr. West:

Q Mr. Overman, let me ask you a couple [T:17] of more. Now, I'm confining my questions to the specific duties of Nancy Schwalb. Did she have any laboring duties at a junction?

A No sir.

Q Did she work up in the yards?

A No.

Q On this particular evening that she was injured, let me rephrase that. You mentioned before in answer to Miss Li's question and in answer to mine, that the sweeping duties in the office and the eating area, the machine shop, would consume about 45 minutes?

A That's right.

Q Is that 45 minutes out of an eight hour shift?

A Yes.

Q What would she be doing in the other seven hours approximately, seven hours and 15 minutes?

A Other than 20 minutes for lunch, she would be cleaning coal.

Q Now, would this be between the dumper and the end of the pier?

A Right.

Mr. West: That's all I have.

RECROSS DIRECTION [sic]

[T:18] By Ms. Li:

Q One more question. When you say clearing coal, can you describe in more detail? How does she clear coal?

A They have a shovel and they also have a scraper, a piece of metal attached to the rod that they rake the coal.

Q And what happens to the coal?

A The coal falls to the dock where it's cleaned up again. Put back on the belts.

Q She had no duties as far as putting the coal back on the belt?

A No.

Ms. Li: That's all I have. Thank you.

Mr. West: As a matter of fact, Mr. Overman, once a Mechanical Department laborer takes the coal and puts it on the ground, because of Union restrictions, she is not permitted to pick that coal up off the ground, is she?

A That's right.

Mr. West: It's the laborer in the Transportation Department that has to come and do that?

That's correct.

Court: No wonder we lose money at the [T:19] ports. You can step down.

Mr. West: Mr. Gross.

W. C. GROSS, called as a witness by the Defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. West:

Q You're W. C. Gross, is that correct?

A That's correct.

Q And you're employed by the C and O?

A Yes sir.

Q In what capacity?

A General foreman, Mechanical Department at the coal piers.

Q Does that put you just over top of Mr. Overman in the ordinary chain of command?

A Yes sir.

Q And you work at the coal piers at Newport News?

A Yes sir.

[T:20]Q Mr. Gross, could you give us your estimate of the distance between dumpers at Pier 14 and the edge of the water of the James River?

A I'd say approximately 300 feet.

Q Would you describe the area between the dumper and the water's edge as an extension of Pier 14?

A Absolutely.

Q I want to show you these photographs we talked about before. You have some familiarity with the area that Miss Schwalb said she was injured at?

A Yes sir.

Q That's shown in Photograph Number One?

A Yes sir.

Q Can you also show the Court in Photographs Two and Three, where the walkway shown in Photograph Number One is located?

A This area of the dumpers right here (indicating).

Q Can not be seen in the photograph?

A Can not be seen in the photograph.

Q And on Photograph Number Three, can you show it?

A The same general area, but can not be seen in this photograph.

Q The distance between where Miss [T:21] Schwalb was injured and the edge of the water is approximately 300 feet?

A I would say so.

Q Are you—we've spoken before of the trunnion rollers which is what Miss Schwalb was on her way to clean coal from beneath. What are the trunnion rollers?

A Trunnion rollers are what support the dumper on the end ring of each dumper, there's a rail and this rail rolls around these trunnion roller wheels in order for the dumper to turn over.

Q And how does the coal get there such as Miss Schwalb was on the way to clean out?

A Well, it's one of those unavoidable spills that gets in between the dumper and down in the trunnion rollers and it's necessary to clean this coal out for the operation.

Q Does the spill occur when coal is being loaded aboard ships?

A Yes sir, when the cars are turned over and the coal falls out of the cars.

Q Now, if no one was assigned the duty of removing spilled coal from the area of the trunnion rollers, what would be the effect—be the effect, if any, on the coal loading operation?

[T:22]A Well, it very seriously effects the operation because the dumpers are not free enough to turn and it also causes undue repair.

Q Are you familiar with whether coal was in fact being loaded off of Pier 14 at the time Miss Schwalb was injured?

A I don't quite follow that.

Q Do you know whether coal in fact was being loaded aboard?

A No, I don't know. I wasn't on duty.

Q You are familiar with the ordinary tasks of someone performing the job that Miss Schwalb was performing January 12, 1983?

A Yes sir.

Q Can you give us your best estimate of the percentage of time that a laborer would be removing spilled coal between the dumper and the end of the pier during an eight hour shift?

A I'm sure it's in excess of fifty percent of the time. If the pier is operating; on the opposite side, it's not operating, they have duties to pull this coal away from under belts and trunnion rollers on the opposite side and the side that is operating, at various times during the shift, it's necessary to pull these rollers or get this coal under these trunnion rollers on the side that is operating.

[T:23]Mr. West: Answer Miss Li, please.

CROSS EXAMINATION

BY Ms. Li:

Q Mr. Gross, the dumper is not located on the pier, is that right?

A It's not on the pier itself, no.

Ms. Li: May I have one moment, your Honor.

(At this time, Ms. Li conferred with Mr. Nexsen.)

Ms. Li: That's all I have.

Court: All right, thank you, sir. You may step down.

Mr. West: Mr. McCarthy.

JOHN F. McCARTHY, called as a witness by the Defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. West:

[T:24]Q Tell us your name, please.

A John F. McCarthy.

Q Employed by the C and O?

A Yes sir.

Q In what capacity?

A My title is Senior Claim Agent.

Q In that capacity, have you handled the claim of Miss Schwalb against C and O for injury on January 12, 1983?

A Yes sir.

Q I hand you a document and ask if you can identify it?

A Yes, that's the Longshoreman Harbor Workers' Form LS201 which is the employee's first notice of injury.

Mr. West: I ask that be marked as Defendant's Exhibit Number Four.

(At this time, the document was received and marked as Defendant's Exhibit Number Four.)

By Mr. West:

Q Is Exhibit Number Four one of the initial documents that are filed with the US Department of Labor to bring the claim under the Longshoremens and Harbor Workers' Compensation Act?

[T:25]A Yes, it is.

Q Would you read in item 17 over the signature of Nancy Schwalb and the date of January 14, 1983, what that says?

A "I am requesting the employer named in item seven to provide me appropriate compensation and medical care for my injury and I hereby make claim for all benefits to which I may be entitled under the Longshoremen and Harbor Workers' Compensation Act or a related law."

Court: What paragraph was that?

Mr. West: 17.

By Mr. West:

Q And under that act, has the C and O paid monies to Miss Schwalb since the date of her accident?

A Yes sir.

Q Payments every two weeks?

A Bi-weekly payments.

Q And through May 29, 1984, how much money has the C and O paid to Miss Schwalb under the act?

A \$20,409.12.

Q Are payments current?

A Yes.

Q She still is receiving payments?

A That's correct.

Q Does the US Department of Labor [T:26] under this act have a rehabilitation program?

A Yes.

Q Are you familiar whether Miss Schwalb was in contact with the US Department of Labor to obtain rehabilitation services?

A Yes, I have received correspondence from the office of Workmens' Compensation Program, Miss Schwalb has been in contact with Mr. Gerald Wright, who is the rehabilitation specialist for the Workmens' Compensation Programs.

Mr. West: Answer Miss Li.

Ms. Li: I have no questions.

Court: Thank you, sir. You may step down.

Mr. West: That's the Defendant's evidence in support of its special plea.

Court: The Defendant rests.

Ms. Li: Your Honor, I'd like to call Miss Nancy Schwalb.

Court: All right.

NANCY SCHWALB, called as a witness in her own behalf, having been duly sworn, testified as follows:

[T:27] DIRECT EXAMINATION

By Ms. Li:

Q Your name is Nancy Schwalb?

A Yes.

Q And you're the Plaintiff in this case?

A Yes.

Q You were injured on January 12, 1983 while you were performing duties for the C and O Railroad?

A Yes.

Q Would you please tell the Court the duties that you were assigned to, that night?

A That night I was assigned, they had just shut down the coal pier, so I was assigned to do a specially thorough cleaning of trunnion rollers, make an inspection of the tower, and continue the duties that I have every night, which were sweeping the shop, sweeping the locker rooms, sweeping the office, the oil house, and the lunch area.

Q Let me back up a bit. What shifts did you work?

Q The third shift.

Q That is from what hours?

A 11 p.m. to seven a.m.

[T:28]Q Would you please tell the Court how much time you spent in—on an average day, how much time you spent on a given job you just described?

A Okay, they had just—well, the jobs clearing the coal from the tower and the dumper only take, combined, only take an hour or two in the shift. And then they had, just because of that, just assigned several other clean-up duties to the third shift laborer in order to fill out the shift. So they had filled out the shift with about another six hours of sweeping up and cleaning up in the locker rooms, in the office and in the shop.

Q Did your duties include work on the pier?

A Not on the—walk out to the pier to get to the tower.

Q The tower is on the pier?

A Yes.

Q How much time do you spend working or clearing coal from the tower?

A Well, the job that I do on the tower is mostly cleaning the coal from underneath the shuttle belt and that can only be done when the machinery is not running. They only shut the machinery down for half an hour during the shift change so it's only about a half hour that I spend on the tower.

[T:29]Q How about working on the dumper area?

A The dumper area, it takes an hour to two hours.

Q And the remaining time of your work, you're involved in what?

A Sweeping and cleaning, like I said, there had just been normally the laborers didn't have much to do on the

third shift, so they had just filled out the duties of the third shift laborers with a lot of clean-up duties.

Q At the time of your injury, were there loading activities on Pier 14?

A No. They weren't loading any coal. They had just shut down.

Q Where you ever assigned to load or unload coal?

A No.

Q Were you ever assigned to operate any of the machinery?

A No.

Q Which Union do you belong to?

A The International Brotherhood of Firemen and Oilers.

Q And is that a Railroad Union or Longshoremens' Union?

[T:30]A Railroad Union.

Q Have you ever been aboard a ship?

A No.

Q You received Longshoremen Workers' Compensation, is that right?

A Yes.

Q Do you have any other income aside from that benefit?

A No.

Q Tell me why did you accept the benefits?

A Well, I started getting the checks before I had gotten a lawyer, and I had no idea that I had any choice other than that, and I had no income whatsoever. I had been

in the hospital for a while and I had a lot of bills to take care of, and I needed it just to live on.

Ms. Li: That's all I have. Thank you.

CROSS EXAMINATION

By Mr. West:

Q Miss Schwalb, are you willing to give the C and O back its \$21,000 approximately that you received over the last better than a year?

[T:31]A If they would give me some other form of compensation, yes.

Q I see. Have you seen Exhibit Number Four, the document L-201 Form?

A Yes.

Q Is that your signature on there?

A I believe so, but on January 14, I was still in the hospital.

Q In fact, January 14, you came back to the C and O and filled out your required accident report, didn't you?

A From my medical records, I was still in the hospital.

Q Let's not talk about your medical records. Let's talk about what you remember. Did you sign out of the hospital for a short period of time while you were in it and come back to the C and O and fill out your accident report form?

A No.

Q You did not? Is this your signature or is it not?

A I'm pretty sure that's my signature, but I know I was in the hospital on the 14th.

Q With everyone of those checks you received over the past almost a year and a half, you get a [T:32] letter that's signed by Mr. McCarthy, don't you?

A Yes.

Q That letter tells you this check is payment for you under the Longshoremen and Harbor Workers' Compensation Act?

A Yes.

Q And you received, when did you hire a lawyer?

A Several months after I had been injured.

Q So you received a fair number of these checks since you hired a lawyer?

A Yes.

Q Did you ever send any of them back?

A I can't.

Q You can't send them back?

A No, I have nothing to live on other than those checks.

Q I understand. You think you're different than any other employee injured while working for the C and O?

A I don't understand what you mean.

Q Well, a lot of people do get injured while working for the C and O, have no source of income and don't get paid under the Longshoremens' Act; do you feel you're entitled to more than those people?

[T:33]A No.

Q Your attorneys have never told you to send one of these checks back, have they?

A No.

Q In fact, during the—since the date of your accident, you have changed your residence—your mailing address, have you not?

A Yes.

Q You went to Mr. McCarthy, asked him to change the address for you to receive the checks?

A Yes.

Q And on two occasions, the checks got lost in the mail, I believe. You went to Mr. McCarthy, told him you wanted new checks issued?

A Yes.

Q And he did?

A Yes.

Q Would you take either Exhibit Two or Three, the overall aerial views. Let's take Number Two. I assume you recognize what's shown in that photograph?

A Yes.

Q Would you show the Court where the office is that you sweep?

A This brick building here (indicating).

Q Would you say that the total size [T:34] of that office is slightly bigger than this Courtroom?

A Around the same size.

Q And where it's showing—show where the locker room is?

A The building right to the left (indicating).

Q How does the size of the interior of the locker room compare with the size of this Courtroom?

A Around the same size. Slightly bigger.

Q And how about the shop, would you show the Court where the shop is?

A This building here (indicating).

Q How big is the shop compared to the size of this Courtroom?

A I think it's a little bigger.

Q Okay. Would you say that it is accurate to describe the total area of the shop, the locker room and the office, as being say, four times the size of this Courtroom?

A Yes, for those three buildings, yes.

Q And each night you sweep them out?

A Those and two others.

Q And two others?

A Yes.

[T:35]Q What are the other two?

A The oil house.

Q How big is the oil house compared—

A The oil house is smaller than the Courtroom.

Q Can you show the Court where the oil house is?

A This building here (indicating). My duties were never more than sweeping it. And then another locker room. This other building here.

Q All of those in the same proximity to each other, doesn't require long walk to get from one to the other?

A No, my duties in those two buildings required more than sweeping.

Q Total of six hours you spent in those areas?

A Yes.

Mr. West: That's all I have.

REDIRECT EXAMINATION

By Ms. Li:

Q What other duties besides sweeping were you engaged in in those two buildings?

[T:36]A Well, in the oil house, I had to clean up any spilled oil which takes quite a while and then in the women's locker room, I had to do a complete clean up, I had to clean the sinks, commodes, showers, floors, that's about it in the women's locker room.

Q You work on the third shift, is that right?

A Yes.

Court: I'm sorry. What was the question?

By Ms. Li:

Q You worked on the third shift, is that right?

A Yes.

Q Did the—was there—excuse me, was there coal being loaded on an average third shift, not on the day of the accident, but on the third shift?

A Yes.

Q And when coal was being loaded, you would not be able to work underneath the trunnion rollers, is that right?

A No, I could work under the trunnion rollers when the coal was being loaded, but I couldn't work on the tower or on any of the belts.

Ms. Li: That's all I have.

[T:37] RECROSS EXAMINATION

By Mr. West:

Q Miss Schwalb, where does the spilled coal come from?

A From the coal cars in the trunnion rollers comes from the coal cars.

Q This occurs when the coal cars are turned upside down and the coal is dumped into the hoppers?

A Yes.

Mr. West: That's all I've got.

Ms. Li: Thank you.

Court: Would you say that—how many days a week do you work?

A Five.

Court: Of those five days a week, how many of those five days do you work six hours cleaning, sweeping, cleaning up oil, 20 minutes for lunch, which leaves you an hour and 45 minutes to do coal, how many days do you do that?

A All five.

Court: All five?

A Yes, I formerly had a job that was nothing but sweeping the shop, took an eight hour shift on the former job of mine.

[T:38] Court: All right. Thank you. All right, anything else, Miss Li?

Ms. Li: Not for evidence, your Honor, unless you—you would hear some oral argument.

Court: All right. All right, Mr. West.

Mr. West: I'd like to bring Mr. Overman back to make a point.

Court: All right.

* * *

M. L. OVERMAN, recalled as a witness by the Defendant in rebuttal, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. West:

Q Mr. Overman, to your knowledge, as foreman in the Mechanical Department of C and O at Newport News, in January of 1983, did you have any laborer in your department working the third shift who spent six hours of eight hours sweeping up and cleaning up in an oil room?

A No, that—I mean—I wouldn't—no.

[T:39] Mr. West: That's all.

Court: All right.

Ms. Li. No questions.

* * *

JA-78



**VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF PORTSMOUTH**

LAW NO. L-83-327

WILLIAM T. MCGLONE,

Plaintiff,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Portsmouth, Virginia

March 29, 1985

Before:

HONORABLE LESTER E. SCHLITZ, CHIEF JUDGE

* * *

[T:13] ROBERT E. LAYNE, JUNIOR, called as a witness by the Defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

RICHARD WRIGHT WEST, appearing for defendant.

By Mr. West:

Q State your name, please.

A Robert E. Layne, Junior.

Q And by whom are you employed, Mr. Layne?

A By the Chessie System.

Q And what is your position with Chessie?

A Electrician.

Q And what department do you work in at Newport News?

A Mechanical Department.

Q Do you know the Plaintiff, William McGlone?

A Yes sir, I do.

[T:14]Q He works also for C & O?

A He did at the time, yes.

Q All right. You mean at the time of his accident?

A Yes.

Q What was his job?

A He was a laborer to clean up spilled coal around the belts on the towers.

Q What was his—what department did he work in?

A He worked in the Mechanical Department.

Q Did he work under you?

A Yes, he did.

Q Was he working under your authority on February 1, 1983, when he was injured?

A He was.

Q Would you tell the Court where he was working when he was injured?

A He was under the dumper cleaning coal off of the belt between one and three main belts.

Q What would you describe as Mr. McGlone's primary job as a laborer in the Mechanical Department at Newport News?

A His primary job was to keep, [T:15] clean up spilled coal.

Q Where would this spilled coal be located?

A Well, between the belts under the dumpers and on the towers.

Q What percentage of an average eight hour shift would you say Mr. McGlone would spend in cleaning up spilled coal between the dumper and the towers?

A I would say a little over fifty per cent of his time was contributed to that.

Q I'm going to show you a photograph, and ask if you can identify what's shown. Show it to Mr. Brahm first.

(At this time, the photograph was shown to Mr. Brahm.)

By Mr. West:

Q Can you identify what's shown on the photograph?

A These are the dumpers that—where they dump the coal for loading the ships at Pier Fourteen.

Mr. West: I would ask that be marked as Defendant's—

Court: I'll mark it as Defend[T:16]ant's Exhibit Number One for the purposes of this proffer.

(At this time, the photograph was received and marked as Defendant's Exhibit Number One.)

By Mr. West:

Q Now, if we can get it so you can show the Judge what you're talking about. Can you stand up, Mr. Layne?

A Sure.

Q In this fashion, would you show the Court where the towers are?

A Well, this is your loading tower right here (indicating).

Q What is this water?

A This is the river.

Q Which river?

A James River. This is the pier.

Q What does the tower do; what's its purpose?

A The purpose of the tower is to distribute coal all over the ship or barge, whichever it may be.

Court: Who employed this man, [T:17] do you know?

A Who employed Mr. McGlone?

Court: Yes.

A C & O.

Court: C & O Railroad?

A Yes.

By Mr. West:

Q What is the tower located on?

A It is located on the pier itself.

Q All right. Would you show the Court, use it with this pen, by drawing an arrow, well, first, can you see in this Exhibit Number One the place where Mr. McGlone was when he was injured?

A Not according to this picture, you can't see. But you can get the vicinity in which he would be.

Q Why is it you can't see it on this photograph?

A Because he is on ground level, and you can't see through all of that.

Court: You say ground level?

A In other words—

Court: What was under his feet, dirt or piling or what?

[T:18]A No, concrete.

Court: Concrete?

A Yes sir.

Court: Is that concrete on land or water?

A Land.

By Mr. West:

Q Would you draw an arrow to the location which is shown above where Mr. McGlone was when he was injured?

A Mr. McGlone was under -

Q Under where you show it?

A Under where the arrow is shown, yes.

Q What is the—what is around that, what is this long thing, both of them next to the end of that arrow?

A This is the incline; these are the dumpers right here, and this is the operator's cab (indicating).

Q Would you explain to the Court, using this photograph, how coal is—how coal gets from coal cars, railroad coal cars onto, say, this ship or barge that's shown in the photograph?

[T:19]A Well, the cars are pulled up this incline, placed on the dumper, turned completely over, into a hopper, which is fed out to the—on the main belts.

Q Where are the main belts?

A This—are your main belts right here (indicating). This is number one and number three (indicating).

Q When the cars are turned over at the dumper, and the coal, by gravity, is dropped down, is it one continuous movement in there to the ship?

A Yes, it is.

Court: All right, sir.

By Mr. West:

Q Now, what is the distance, if you know, from the place where Mr. McGlone was injured to the edge of the water of the James River?

A I would say between two hundred fifty to three hundred feet.

Q Okay. And tell us specifically what it was that Mr. McGlone was doing when he was injured?

A Well, there was some spillage of coal between the belts and the ground, which would shift the belt over and make it run to one side, which would cause more spillage. And he was cleaning that coal out at the time, and he got his arm caught in the belt and the roller.

[T:20]Q Was coal being loaded aboard a barge at the time this happened?

A I do believe it was a barge.

Q Some sort of a vessel?

A Either—I would say there was a ship on one side and a barge on the other.

Q All right. Now, what would occur if the spilled coal in this instance would not be removed?

A Well, you would have damage to the belt, and you would eventually have to shut down your operation to clean it up, which would take twice the time delay.

Q Did Mr. McGlone, while working under you, have any duties that were away from the pier area?

A Not while working for me, he did not.

Q Ever work up in the general yard?

A Not for me, he didn't.

Court: Who do you work for?

A I work for the C & O.

By Mr. West:

[T:21]Q Did Mr.—was Mr. McGlone ever called upon to clean an office or empty trash cans?

A Only on occasions when there was no ship or coal to be cleaned up, he would be asked to sweep the office floor or empty the trash can.

Q Routinely, without specific instructions, would Mr. McGlone's duties include cleaning up an office or emptying trash cans?

A No.

Mr. Brahm: Is that while working for you or working for other people?

A Well, any time.

RUSSELL N. BRAHM, III, appearing for plaintiff.

Mr. Brahm: How can you say what other people—

A I can't tell what the other man -

Court: You'll get a chance to cross examine him.

By Mr. West:

Q Talking about this job, Mr. McGlone was performing and had performed before—

A Right.

Q Did it include as a routine, without specific instructions, cleaning offices or trash cans?

A No, it was not a routine job.

[T:22]Q Do laborers, such as the job Mr. McGlone had, ever go aboard ships?

A On special occasions they may be asked to go to clean coal off of a beam on the boom.

Q So, again, that would be cleaning spilled coal?

A That's cleaning spilled coal.

Mr. West: Answer Mr. Brahm, please.

CROSS EXAMINATION

By Mr. Brahm:

Q Mr. Layne, you worked for the railroad about thirty-eight years, haven't you?

A Yes.

Q You consider yourself a good employee, don't you?

A I hope so.

Q Okay. How long did Mr. McGlone work for you, sir?

A Maybe three or four months.

Q Okay. So you don't know really what he did prior to that three or four months, do you?

A Well, I had seen him around.

[T:23]Q But you don't know what his specific duties because he worked for someone else, isn't that true?

A He did.

Q Now, isn't it true that when Mr. McGlone was injured the belts were running at that time?

A Yes.

Q Are you familiar with the Safety Rule 196, sir?

A Yes sir.

Q I show you Rule 196, and ask you if you can read it for the record, please.

A "Before performing"—

Mr. West: We would note our objection to the evidence, whether we violated the safety rule or not, has nothing to do with the issue of Longshoremen's and Harborworkers' Compensation Act.

Court: Overrule your objection, and allow you to read it in the record for a proffer.

A "Before performing any work on conveyor belts or rollers or stepping on or across belts, employees must take necessary precautions to assure that such equipment is stopped and that movement is not resumed until work has been completed and all employees are in the [T:24] clear."

By Mr. Brahm:

Q You were with Mr. McGlone at the time he was injured, isn't that true, or shortly before that time?

A Yes, I was.

Q And you instructed Mr. McGlone to clean out underneath the belt while it was moving, did you not?

A I asked him to clean the coal out, yes, I did.

Q And the reason why the belts were moving was because the belts were indirectly loading the barge Maryland or that other ship at that time?

A True, they were directly loading the ship.

Court: Did he have anything to do with the actual putting the coal on the belt, or was he just cleaning it out when it dropped off?

A No sir, he does not have anything to do with putting it on the belt.

Court: He wasn't loading that coal; he was cleaning up the debris?

A He was cleaning it up.

Court: All right, sir.

[T:25] By Mr. Brahm:

Q And he doesn't put that coal he cleans up back on the belt, does he?

A No sir, that comes under another department.

Q Now, you never saw Mr. McGlone go aboard a ship, did you?

A No, I can't say that I have.

Q You never ordered him to go aboard a ship, did you?

A No.

Q You never ordered him to clean any spilled coal from any of the ships, did you?

A No.

Q When was it you first learned that Mr. McGlone was injured?

A When we heard him holler.

Q What did you do then?

A We went around to see what was the trouble.

Q Did you have the belt cut off?

A Well, at the time I couldn't say that they were or they weren't. I really don't remember.

Q But the belts were running at the time Mr. McGlone was injured?

[T:26]A Right.

Mr. Brahm: I don't have any other questions.

I do have one other question.

By Mr. Brahm:

Q Can you identify this (indicating)?

A No sir, I've never seen it before.

Mr. Brahm: Okay. I would like to offer this as—

Court: What is it? If he hasn't seen it, how can you offer it?

Mr. Brahm: Notice to employees under coverage of the Longshoremen's and Harborworkers' Compensation Act.

Mr. West: We object.

Court: Are you going to be a witness to testify what this is?

Mr. Brahm: From a negative—

Court: I sustain the objection.

Mr. Brahm: I was just going to say—

Court: I sustain the objection.

Mr. Brahm: I don't have any other [T:27] questions.

Court: All right. You can step outside.

Mr. West: Mr. Gross.

WILLIAM C. GROSS, called as a witness by the Defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. West:

Q Tell us your full name, please.

A William C. Gross.

Q By whom are you employed?

A Chesapeake and Ohio Railway Company.

Q Your position?

A General Foreman in the Mechanical Department.

Q As such, is Mr. Layne underneath you?

A Yes sir.

[T:28]Q And would Mr. McGlone have been under him?

A Yes sir.

Q What was Mr. McGlone's job in the area of February 1, 1983?

A He was employed as a laborer in the Mechanical Department.

Q What is the primary job of a—

Court: Employed by whom, sir?

A Chesapeake and Ohio Railway Company.

By Mr. West:

Q What is the primary job of a laborer in the Mechanical Department of C & O in Newport News?

A To clean up trash coal as we call it, coal spillage off the belts, and so forth, from loading coal.

Q Do you have some estimate of the percentage of time that a laborer in the Mechanical Department of C & O at Newport News, such as Mr. McGlone, would have spent in cleaning up spilled or trash coal?

A Yes sir, well in excess of fifty per cent of his time.

Q Were you present when Mr. [T:29] McGlone was injured February 1, 1983?

A No, I was not.

Court: You keep any records what per cent of time he works during that against other time?

A No sir.

Court: Mr. McGlone, specifically, you got any records of what time he does that and what time he does his other duties?

A No sir.

Court: You're speculating as fifty per cent, well over fifty per cent, are you?

A Well, the laborer's job—

Court: Talking about Mr. McGlone.

A I'm speaking of the laborer in general.

Court: I want to know about Mr. McGlone.

A He was employed as a laborer to clean up trash coal.

Court: Do you have any records or any knowledge of how much time he spent—

A No sir.

By Mr. West:

[T:30]Q You have such records on any laborer?

A No sir.

Q Are you aware of the place that Mr. McGlone was when he was injured?

A Yes sir.

Q Do you know the distance from that place to the edge of the water of the James River?

A Approximately three hundred feet.

Q And what is—between where Mr. McGlone was injured and the edge of the water of the James River?

A Well, it's the dumper and the main belt drive for the belts, and the belt structure.

Q What is the—what happens from the time that the coal cars are turned upside down at the dumper, and

dropped by gravity, until that coal gets aboard a ship or barge?

A When the cars are turned over on the dumper, the coal free falls into a hopper, it's fed by feeder belts onto the main belt. The main belt takes it out the pier from under the dumper, up the incline to the tower, where it's dumped onto the shuttle belt. From there the shuttle belt is able to carry the coal from either side to [T:31] either side of the pier, north or south side. From there it's dumped onto the boom belt and off the boom belt down through the chute into the hold of the ship.

Q From the dumper to the pier, is that a straight line?

A Yes sir.

Q Is the movement of the coal from the dumper to the tower and then onto the ship one continuous movement while loading is going on?

A Yes.

Q Now, what happens if the spilled coal or the trash coal is not removed?

A Well, good possibility if it gets bad enough, it can cause damage to the equipment; therefore, it can be—could be a major catastrophe, and cut you down where you can't operate at all.

Court: What happens to the coal that's spilled? Is that used again?

A It's cleaned up, picked up and stored, and put back in cars. I don't know how it's disposed of or where it goes once it's put back in cars.

Court: Not thrown away as trash?

A Trash coal is an expression.

Court: I'm talking about the [T:32] coal itself, it's used somewhere again?

A Yes.

Court: Have you ever done this kind of work yourself?

A No sir, not primarily employed for it, no.

Court: You have never done it either. Have you ever done cleaning?

A I've used a shovel and a pick, and so forth, but it's not my primary job.

By Mr. West:

Q Do laborers in the Mechanical Department of the C & O at Newport News go aboard ships?

A They have done it.

Q For what purpose?

Court: How about Mr. McGlone?

A I couldn't tell you anything specifically about Mr. McGlone. Whether he has been aboard a ship or not.

Mr. Brahm: I'm going to go ahead and object to any question—

Court: I object to what laborers, some laborers do, because—I sustain the objection to that. It's what Mr. McGlone's duties were.

By Mr. West:

[T:33]Q You're not aware of whether he ever did go aboard a ship?

A I have no personal knowledge of it, no sir.

Q Have you ever been aboard a ship with a laborer by the name of John Fox to clean up coal?

Mr. Brahm: I object to that.

Court: Sustain the objection.

Mr. West: I understand Mr. Fox is going to be a witness.

Court: It's what this man's duties are.

Mr. Brahm: I may not call him as a witness.

Mr. West: Then it is irrelevant.

Court: I sustain the objection. It's regarding this particular man's duties.

Mr. West: We except to that. I don't agree it's limited to just what this specific man did.

Court: I overrule your objection. It is what this man was doing and what he was doing that is important here.

Mr. West: As long as I have [T:34] my exception.

Court: All right.

By Mr. West:

Q Other than when he might be—Mr. McGlone might be specifically assigned to clean an office, empty trash cans, what did he do?

A If the pier wasn't operating, he had the towers to clean up; he had the trunnion rollers to take care of and the spilled coal on the walkways on the dumper.

Q Where are the towers located?

A Offshore.

Q On the pier?

A On the pier.

Mr. West: Answer Mr. Brahm.

CROSS EXAMINATION

By Mr. Brahm:

Q In addition to cleaning the spilled coal, Mr. McGlone would also be required to clean offices out, would he not?

A Occasionally.

Q In addition to cleaning offices out, wouldn't he be required to clean out portions of the [T:35] shop and the locker rooms?

A Occasionally.

Q Isn't it true he would also be required to clean out the restroom of the office spaces that he would be working in or other people would be working in?

A Not the office, but the locker rooms, probably.

Q Now, at the time of this accident, February 1, 19-1983, did the Chessie System have certain safety rules that were in force?

A Yes.

Q I show you a copy of the safety rules here, and I'd like to ask you if you would read Rule 196.

Court: Hasn't that-

Mr. Brahm: That was the other—that wasn't introduced either.

Mr. West: My same objection to the relevancy.

Court: All being proffered, so I overrule your objection. Go ahead.

A Rule 196 states, "Before performing any work on conveyor belts or rollers or stepping on or across belts, employees must take necessary precautions [T:36] to assure that such equipment is stopped and that movement is not resumed until work has been completed and all employees are in the clear."

By Mr. Brahm:

Q Was this safety rule in effect at the time of this accident?

A Yes sir.

Q What is the reason for having the belts stopped before any employees work underneath it?

A For safety sake.

Mr. Brahm: Judge, we'd like to offer this as Plaintiff's Number One.

Court: Received over his objection as Plaintiff's Exhibit One.

(At this time, the document was received and marked as Plaintiff's Exhibit Number One.)

By Mr. Brahm:

Q Now, if the belts were not running, then the barge or the ship that was being loaded couldn't be loaded, is that true?

A That's true for that particular side, yes.

Q So if the belts were stopped, in accordance with the safety rules, then the ship wouldn't [T:37] be loaded?

A Not for that period of time.

Q Now, how long did Mr. McGlone work for you, sir?

A I don't have any record of that. I don't know what his employment dates were.

Q Mr. Layne testified he worked approximately four months for Mr. Layne. Would that refresh your recollection, or would that give you some idea how much time he worked for you?

A Well—

Q Mr. Layne worked for you?

A For the same period of time, for that same period of time, it would still—

Court: You say you don't know. I don't think you can ask him what somebody else said.

Mr. Brahm: The only reason I did that, I thought since Mr. Layne worked for Mr. Hamilton or Mr. Gross, that perhaps he could probably—but if you don't know of your own free knowledge—that's all the questions I have.

Court: Anything further?

Mr. West: Nothing further.

Court: You're excused, sir.

Mr. West: That concludes the [T:38] C & O proffer of evidence.

* * *

[T:67] WILLIAM C. McGLONE, called as a witness in his own behalf, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Brahm:

Q Mr. McGlone, will you please state your address, for the record?

A 1035 - 41st Street, Newport News, Virginia.

[T:68]Court: What's your name?

A William C. McGlone.

By Mr. Brahm:

Q Mr. McGlone, on February 1, 1983, by whom were you employed?

A C & O Railroad.

Q I see. And what were you doing, what kind of job did you have with the C & O Railway?

A Laborer. Janitorial work.

Q When did you begin working for the C & O Railroad, sir?

A '70.

Q Would you briefly tell the Court what type of jobs you had from 1970?

Court: What were you doing on this particular day you were hurt?

A I was on Pier Fifteen side, was cleaning up. Like they have Pier Fifteen, they shut down, they clean up the motor room and the big room in there. You got to sweep the floor and get the paper over on that side.

And Mr. Layne called me on the radio to meet him on the dumper over on Pier Fourteen. And he asked me when I got over there, he asked me would I clean out the belt over there, number three belt. And I told him, I said, I asked him to shut it down, which I asked him that [T:69] on the radio, and—

Court: You went over to clean it out. What were you supposed to clean out on the belt?

A The coal spilling.

Court: Falling off the belt?

A The belt was torn, three or four inches torn off, and it was falling down underneath that.

Court: Was that a job you generally did?

A No sir.

Court: What was your work totally, what do you do from day to day?

A From day to day, we clean up most bathrooms, bunkhouse, they didn't—even need us at Pier Fourteen. They would come and get us to send us to the—just to the bunkhouse, making up beds, clean up the caboose, engine and things like that.

By Mr. Brahm:

Q During that period of time, was there a lot of coal loading on ships?

A I don't know. I think they was loading, I don't know for sure what they were loading out there. They had a lot of work coming in and out at that period of time.

[T:70]Q Mr. McGlone, were you ever required, as part of your duties to go aboard a ship?

A No, never have.

Q Where you ever required, as part of your duties, to load any coal aboard any ships?

A No

Court: You ever load coal on the belts?

A No sir.

By Mr. Brahm:

Q What would you do with this spilled coal that would fall down between the belts?

A Well, that wasn't my job. It come under transportation. They would clean it up.

Q So your job would only be to blow the coal out?

A Well, no, it wouldn't. He just insisted me come over there and blow it out. If they do that, it mostly would be shut down, they would come up and get us. We working one side, and they put us on the other side to clean up over there sometime.

Court: How often did you do that?

A Often as they come and get us.

Court: How often was that, [T:71] every day, every other day?

A Sometimes practically every other day or every day sometimes.

By Mr. Brahm:

Q Mr. McGlone, how long did you work for the Mechanical Department just before this accident?

A From '76, the twelfth month and the ninth day of '76.

Q How long did you work for Mr. Layne?

A Well, I was working underneath him off and on from '76 on, until the accident. We have different shifts. I would be under him every time since I have been there.

Q Mr. McGlone, have you ever been injured while you worked for the railroad before?

A Yes, I have.

Q How many times, sir?

A I guess about four times, if I am not mistaken, I believe four times.

Q Do you recall an injury that you had in July of 1982?

A Yes, on that same belt.

Q Where was that injury, sir? Was that on the land or over the water?

[T:72]A On land.

Q Was it closer to the water than where you were injured this time?

A It was closer, yes, than where I was at that time.

Mr. Brahm: Can I look at Plaintiff's Exhibit Number Two, Judge? I think it's a photograph.

By Mr. Brahm:

Q I'll show you what has been previously admitted as Plaintiff's Exhibit Number Two, and ask you if you can identify the photograph, first, and if you can show us where you were injured in July of 1982.

Why don't you stand up and point it out to the Judge.

A Right in here on the outside of this dumper, right down in here underneath where part of this is at (indicating).

Court: Put an "X" where you say it was.

(At this time, the witness complied with the request of the Court.)

A Somewhere in here (indicating).

Court: Write down hard on it [T:73] with an "X." Right there (indicating)?

A Yes.

By Mr. Brahm:

Q What were you doing at the time of this injury?

A We was washing the belt, the coal out from underneath the belt with high pressure hose.

Q All right. And was the belts on or were they off?

A No, they was shut down. They was working the other side. They always shut down.

Q Were you ever offered any longshoremen benefits for this injury?

Mr. West: I object to the question and the line of questioning unless there's some authority for an estoppel.

Court: Let me ask you one thing here. Were you injured at that time?

A Yes sir.

Court: Did you receive any compensation for your injuries?

A No sir.

Court: From any source?

A No.

Mr. West: That's the subject of [T:74] my objection. Unless there's some estoppel theory.

Court: I think—

Mr. Brahm: The railroad cannot have it both ways.

Court: I think it certainly can.

Mr. West: We can.

Court: I overrule your objection.

By Mr. Brahm:

Q Mr. McGlone, did you settle that claim with the railroad company?

A Yes.

Mr. West: My objection relates to all this.

Court: Overrule your objection. It is relevant, what type of work he was considered by the railroad and by him.

By Mr. Brahm:

Q Can you—

Mr. West: In 1982?

Court: I understand that.

Mr. Brahm: The act they claim coverage under was enacted in 1972.

Court: I understand.

[T:75] By Mr. Brahm:

Q Can you identify that, sir?

A Yes sir.

Q What is that, sir?

A This was the thing where I signed to settle the claim when I got hurt in '82.

Q What did the Claim Agent tell you, what law did he say it was under?

A FELA.

Mr. Brahm: We'd like to have this admitted as Plaintiff's Exhibit Four.

(At this time, the document was received and marked as Plaintiff's Exhibit Number Four.)

Mr. West: Note our objection.

Court: All right, sir.

By Mr. Brahm:

Q Mr. McGlone, are you familiar with the contract that exists between your labor union and the railway company?

A Yes.

Q Do you know of any provision in that contract that provides for compensation under the Longshoremen Act?

[T:76]A No sir.

Q Now, Mr. McGlone, prior to this injury in 1983, which is the subject matter of this litigation, if you were injured, wherever you were injured, what law or what act did you expect to be covered under?

Mr. West: I object.

Court: I sustain the objection. What he expected is not relevant.

Mr. Brahm: I withdraw the question.

Mr. McGlone—Judge, may I have Plaintiff's Exhibit Number Three, I believe it is. The notice.

(At this time, the exhibited [sic] was handed to Mr. Brahm.)

By Mr. Brahm:

Q Mr. McGlone, in the course of your employment with the railway company, are you required to look at bulletin boards for notices?

A Yes—bulletin notices on the bulletin board, you have to go there, because they put up different jobs, you check that every day.

Q And is this—on the C & O pier facility?

A Yes.

[T:77]Q I ask you if you will look over Plaintiff's Exhibit Number Three and see if you can identify that as being posted in your—

Court: Have you ever seen a notice like that?

A No sir, never have.

By Mr. Brahm:

Q Now, Mr. McGlone, were the belts moving, or were they shut down at the time you were injured?

A They was moving.

Q Would you tell the Judge what you did just before you were injured?

Court: Now, we're getting into the facts of this.

Mr. Brahm: I think it's important, Judge, because of the fact that he—he requested the belts be shut down.

Court: I understand that, but that's not—we got somewhere the FELA stuff, the Longshoremen's and Harborworkers' Act starts, and somewhere, it's maybe here or there, and that's the factual situation I believe I have to determine, but how he actually got injured doesn't make any difference.

The idea was what I think is [T:78] relevant, whether he was loading or not unloading, exactly what he was doing, which he told you he was doing. But—somewhere there has got to be a line where one act stops and the other one starts. And that's what I believe I have to determine here.

By Mr. Brahm:

Q Mr. McGlone, have you ever accepted any benefits, compensation benefits under the Longshoremen Act?

A No sir. I didn't know anything about it, because at the time I was in the hospital, and when I come home out of the hospital I had checks there at the house. And I knew I wasn't supposed to be getting under. He explained it to me, it comes under the maritime. And I knew I wasn't supposed to come under that, and I called you.

Q Did you send those checks back?

A Yes.

Q Are you receiving any benefits right now, sir?

A Yes.

Q From where?

A Railroad Retirement Board.

Q Mr. McGlone, did Mr. Layne tell you at the time of your injury that it was important [T:79] for you to clean

out under the belts while they were running because the barge was being loaded?

A Yes. He insisted that I should clean out from underneath the belt at the time it was running.

Q Have you ever been a member of the International Longshoremen's Association?

A No sir.

Mr. Brahm: That's all the questions I have.

CROSS EXAMINATION

By Mr. West:

Q Mr. McGlone, you referred before to your agreement. That's the agreement between your union and the railroad that you're talking about?

A Yes, the Boilermakers, Oilers.

Q And you said there was nothing in there that said that you would be covered under the Longshoremen's and Harborworkers' Compensation Act?

A No, not as I know of.

Q Is there anything in there that says you won't be covered under the Longshoremen's and Harborworkers' Compensation Act?

[T:80]A Well, the way they explained it to us—

Q What I'm asking, you said—

Mr. Brahm: He's trying to explain it.

Mr. West: This is what somebody told him.

By Mr. West:

Q You read the contract; is there anything in it?

A No, it's not.

Mr. West: That's all I have.

Court: All right. Step outside, sir.

Mr. West: If I might make a point here. I think Mr. Brahm will agree with it. If the Court got the impression we are claiming the man comes under the act but are not paying him compensation, this is pursuant to an agreement between the C & O and your firm. We wouldn't just continue every two weeks sending him a check and having it returned.

Court: Certainly not relevant for this, what we're doing here now.

* * *

**VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF PORTSMOUTH**

AT LAW NO. _____

WILLIAM C. MCGLONE,

Plaintiff,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant.

SERVE:

Aubrey R. Bowles, III, Esquire
Registered Agent
Chesapeake & Ohio Railway Company
901 Mutual Building
Richmond, Virginia 23219

REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiff, by counsel, pursuant to the Rules of Court, requests that the defendant respond within twenty-eight (28) days after service, at the offices of Moody, Strole, Brahm & Lawrence, Ltd., 201 J. J. Henry Building, County and Court Streets, Portsmouth, Virginia, produce or make available for copying, or furnish the originals or copies of the following, or permit the plaintiff to have copies made at his expense, the following items:

1. Produce ship docking and ship departure reports for pier 14 for February 1, 1983.
2. Produce all documents the defendant intends to rely upon at trial or hearing in this matter.
3. Produce all Release of Claims forms executed by the plaintiff within the last ten (10) years.

4. Produce all Railroad Retirement Sickness Benefits Apportionment forms executed by the plaintiff within the last ten (10) years.
5. Produce all Notices of Compensation used by the defendant within the last ten (10) years at its Newport News yard.
6. Produce the plaintiff's entire personnel file.
7. Produce the plaintiff's entire medical file.
8. Copies of the lists of Railway personnel working at the Newport News Barney yard and Pier 14 on February 1, 1983.

WILLIAM C. MCGLONE

By /s/ Russell N. Brahm, III
Of Counsel

Russell N. Brahm, III
Willard J. Moody
Moody, Strople, Brahm
& Lawrence, Ltd.
Post Office Box 1138
Portsmouth, Virginia 23704-1138

**VIRGINIA: IN THE CIRCUIT COURT FOR THE
CITY OF PORTSMOUTH**

LAW NO. L-83-327

WILLIAM C. MCGLONE,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant.

**RESPONSE TO REQUEST FOR
PRODUCTION OF DOCUMENTS**

The defendant herewith responds to the plaintiff's Request For Production Of Documents and says:

1. Produced herewith to the plaintiff.
2. Any or all documents previously or subsequently furnished by way of Answer To Interrogatories by the defendant or in response to this or subsequent Request.
3. Produced herewith to the plaintiff.
4. Produced herewith to the plaintiff.
5. Produced herewith to the plaintiff.
6. Produced herewith to the plaintiff.
7. Produced herewith to the plaintiff.
8. See defendant's Answer to Interrogatory No. 3, previously filed herein.

**THE CHESAPEAKE AND OHIO
RAILWAY COMPANY**

By /s/ Richard Wright West
Of Counsel

JA-111

**Richard Wright West, Esquire
WEST, STEIN, WEST & SMITH, P.C.
P. O. Box 257
Newport News, VA 23607
Counsel for Defendant**

THE CHESAPEAKE & OHIO RAILWAY COMPANY
SETTLEMENT AND FINAL RELEASE OF ALL CLAIMS
Read Carefully Before Signing

The undersigned acknowledges the receipt of Two Thousand & 00/100 Dollars (\$2,000.00) from THE CHESAPEAKE & OHIO RAILWAY in full settlement and satisfaction of all claims, demands, and causes of action hereinafter mentioned, and in consideration of said payment hereby RELEASES and forever discharges THE CHESAPEAKE & OHIO RAILWAY COMPANY, its agents, servants and employees _____ from all claims, demands, and causes of action which the undersigned has or might have against them or any of them arising out of or in any way connected with personal injuries received at or near Newport News, Virginia, on or about July 9, 1982. This settlement is made upon my representation that I have not received any supplemental sickness benefit payments because of this accident and if I do receive any hereafter because of this accident, I agree to reimburse said Railroad Company the amount so received.

Both the undersigned and the Company do now acknowledge that the injuries which the undersigned sustained may be permanent and progressive; that recovery may be uncertain and indefinite and that injuries, damages and losses may not now be fully known and may be more numerous and more serious than now believed. In making this SETTLEMENT AND FINAL RELEASE the undersigned relies wholly upon his or her own judgment and has not been influenced to any extent whatever by any representation or statement of the claim agent, doctors, or other representatives of the Company. The undersigned admits that no promise or agreement has been made to him or her, and that this RELEASE contains the entire agreement between the parties hereto and that all the

terms of this RELEASE are important parts of this contract and are binding upon all parties.

The word "injuries", where used in this SETTLEMENT AND FINAL RELEASE, include all injuries which are unknown as well as injuries which are known and includes all consequences of such injuries which may hereafter develop as well as consequences now developed. This settlement is intended to be final, the undersigned taking his or her chances that the injuries may prove to be more serious than now believed and the other parties taking their chances that the injuries may prove to be less serious than now believed.

It is further understood and agreed that this is a settlement by compromise of a disputed claim and that the payment made is not to be construed as an admission of liability, all liability being expressly denied.

I have read and understand this release W.C. Mc.

SIGNED and SEALED at N.N.VA., on this 6 day of
AUG, 1982

Witnesses Sign Here /s/ William C. McGlone

/s/ W.B. Swain

/s/ F.L. Royall

Newport News, Virginia, August 6, 1982

The Chesapeake and Ohio Railway Company having agreed to pay the sum of xx Two Thousand & 00/100 xx Dollars in settlement of my claim for personal injuries received at or near Newport News, Virginia on or about July 9, 1982, I hereby request said Railway Company to apportion the entire amount to be paid in said settlement to factors other than time lost. It is understood that this request is made and this consent given for the sole purpose of complying with the requirements of the Railroad Retirement Act, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act, and is not to be so construed as to impair or limit the effect of the personal injury settlement above mentioned or of the general release which I am to execute in consideration of said settlement.

This settlement is subject to lien of the Railroad Retirement Board in the amount of No lien.

/s/ William C. McGlone
Railroad Identification No. 2612047

Witnesses: /s/ W.B. Savain
/s/ F.L. Royall

The apportionment above requested is hereby made.

Executed at Richmond, Virginia on this 6th day of August, 1982.

The Chesapeake and Ohio Railway Company
By: /s/ F.R. Royall

Rev. 8-71

Invoice No. I 47392

**ACCIDENT/INCIDENT REPORT
THE CHESAPEAKE AND OHIO RAILWAY COMPANY**

1. ACCIDENT/INCIDENT NUMBER
INN-0195
2. AUTHORIZATION DATE
7/20/82
3. LAST NAME, FIRST NAME, MIDDLE INITIAL
McGlone, William C.
4. IDENTIFICATION NUMBER
2612047
5. SOCIAL SECURITY NUMBER
226-40-8431
6. ADDRESS - NUMBER AND STREET - CITY AND STATE
- ZIP CODE
732 - 34th St., Newport News, Va. 23607
7. OCCUPATION
Laborer
8. SEX
Male
9. DATE OF BIRTH
8/31/34
10. AUTHORIZING OFFICER
W.C. Gross, Gen. Foreman-Piers
11. RESP. CODE
2024
12. OFFICER'S TELEPHONE
(804) 380-5080

THIS IS FIRST REPORT
FINAL REPORT

13. HISTORY (INCLUDING SPECIFIC LOCATION AND DESCRIPTION OF INCIDENT THAT CAUSED INJURY ON-SET OF ILLNESS)

Patient states that he fell on a conveyor belt, sustaining injury to his back and right hip

14. DATE OF INJURY OR ILLNESS

7/9/82

15. FINDINGS ON EXAMINATION (ATTACH RESULTS OF X-RAYS, TESTS, OTHER STUDIES, OPERATING NOTES, DISCHARGE SUMMARIES, ETC.)

Re: William McGlone #5697 July 22, 1982

#5697

July 22, 1982

Mr. McGlone is in the office today and he apparently sustained an injury to his right side on July 9, 1982, when he fell against some equipment at his job, resulting in an injury to the mid-portion of his right thigh and the hip area. X-rays were not performed at the time of the injury. He was seen in the ER and evaluated for these injuries. He is seeking an orthopaedic evaluation for an opinion as to the nature of these injuries.

On examination, he does have signs of an injury that is healing on the lateral aspect of his thigh, this does not appear to be serious, but there is some swelling and soreness around this area. We advised him that this should be treated simply with cleansing the area and allowing it to heal over from the sides. He also, has some soreness over the right iliac crest. X-rays taken indicate no evidence of any fractures, but there is tenderness to palpation. Moist soaks, and moderation of activity are advised as a form of treatment. This basically is the extent of his injuries; the diagnosis is abrasion of the right thigh, and a contusion of the right iliac crest. ADG/msd

16. DIAGNOSIS

See #15 above.

17. TREATMENT GIVEN PRESCRIBED (SPECIFY)

See #15 above.

18. FURTHER TREATMENT INDICATED?

NO

19. MEDICATION GIVEN PRESCRIBED?—

NO

20. PATIENT HOSPITALIZED?

NO

21. PATIENT TREATED BY ANYONE ELSE?—

NO

22. PATIENT DISPOSITION (PATIENT INSTRUCTED AS
FOLLOWS)

ABLE TO RETURN TO DUTY-NO RESTRICTIONS-ON 7/
26/82 DATE

23. ADDITIONAL COMMENTS SPECIFIC RECOMMENDA-
TIONS OF TREATING PHYSICIAN

See #15 above.

24. TREATING PHYSICIAN SIGNATURE

/s/ A. Greene, M.D.

25. DATE

7/26/82

27. TREATING PHYSICIANS NAME (IF DIFFERENT FROM
PAYEE)

Arthur D. Greene, M.D.

28. ADDRESS - NUMBER AND STREET

2019 Cunningham Dr.

29. CITY AND STATE

Hampton, VA 23666

JA-118

30. DATE ITEMIZED SERVICE SUPPLIES AMOUNT

7/22/82	initial visit	40.00
7/22/82	x-ray rt pelvis	35.00

31. TOTAL FEE

\$75.00

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CHESSIE SYSTEM

AUG 2 1982

Casualty Prevention Department
BALTIMORE MARYLAND

ACCIDENT/INCIDENT REPORT

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

1. ACCIDENT/INCIDENT NUMBER

INN-0195

2. AUTHORIZATION DATE

7/13/82

3. LAST NAME, FIRST NAME, MIDDLE INITIAL

McGlone, William C.

4. IDENTIFICATION NUMBER

2612047

5. SOCIAL SECURITY NUMBER

226-40-8431

6. ADDRESS - NUMBER AND STREET - CITY AND STATE

- ZIP CODE

732 - 34th St., Newport News, Va. 23607

7. OCCUPATION

Laborer

8. SEX

Male

9. DATE OF BIRTH

8/31/34

10. AUTHORIZING OFFICER

W.C. Gross, Gen. Foreman-Piers

11. RESP. CODE

2024

12. OFFICER'S TELEPHONE

(804) 380-5080

THIS IS FIRST REPORT

13. HISTORY (INCLUDING SPECIFIC LOCATION AND DESCRIPTION OF INCIDENT THAT CAUSED INJURY ON-SET OF ILLNESS)
Foot slipped while washing under coal loading belt and fell against metal beam hurting rt. thigh.

14. DATE OF INJURY OR ILLNESS
7/9/82

15. FINDINGS ON EXAMINATION (ATTACH RESULTS OF X-RAYS, TESTS OTHER STUDIES OPERATING NOTES DISCHARGE SUMMARIES ETC.)
Healing abrasion and contusion of right thigh. Strain of right lower lumbar muscles.

16. DIAGNOSIS
Abrasion and contusion of thigh & back pain.

17. TREATMENT GIVEN PRESCRIBED (SPECIFY)
Rest, heat, fomax tablets for pain, Soaks & Neosporin Ointment to abrasion.

18. FURTHER TREATMENT INDICATED? - DESCRIBE
YES - as above

19. MEDICATION GIVEN PRESCRIBED? - DESCRIBE
YES - Fomax

20. PATIENT HOSPITALIZED?
NO

21. PATIENT TREATED BY ANYONE ELSE? -
YES - ER at Riverside Hospital

22. PATIENT DISPOSITION (PATIENT INSTRUCTED AS FOLLOWS)
UNABLE TO RETURN TO DUTY - ANTICIPATED LOSS OF TIME 10 DAYS
ADDITIONAL INSTRUCTIONS - FOLLOW UP APPOINTMENT: ABOUT 7/20/82

24. TREATING PHYSICIAN SIGNATURE
/s/ Hugh Givens, Jr. MD

JA-121

25. DATE

7/13/82

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AUG 2 1982

Casualty Prevention Department
BALTIMORE MARYLAND

JA-122

Invoice No. I 47393

ACCIDENT/INCIDENT REPORT

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

1. ACCIDENT/INCIDENT NUMBER

INN-0195

2. AUTHORIZATION DATE

7/20/82

3. LAST NAME, FIRST NAME, MIDDLE INITIAL

McGlone, William C.

4. IDENTIFICATION NUMBER

2612047

5. SOCIAL SECURITY NUMBER

226-40-8431

6. ADDRESS - NUMBER AND STREET - CITY AND STATE

- ZIP CODE

732 - 34th St., Newport News, Va. 23607

7. OCCUPATION

Laborer

8. SEX

Male

9. DATE OF BIRTH

8/31/34

10. AUTHORIZING OFFICER

W.C. Gross, Gen. Foreman

11. RESP. CODE

2024

12. OFFICER'S TELEPHONE

(804) 380-5080

THIS IS FIRST REPORT
FINAL REPORT

13. HISTORY (INCLUDING SPECIFIC LOCATION AND DESCRIPTION OF INCIDENT THAT CAUSED INJURY ON-SET OF ILLNESS)
See 1st report.
14. DATE OF INJURY OR ILLNESS
7/9/82
15. FINDINGS ON EXAMINATION (ATTACH RESULTS OF X-RAYS, TESTS OTHER STUDIES OPERATING NOTES DISCHARGE SUMMARIES ETC.)
Much improved. Laceration on thigh healing. Twinge of pain in right lower back with certain movements.
16. DIAGNOSIS
Contusion of thigh with laceration and low back strain.
17. TREATMENT GIVEN PRESCRIBED (SPECIFY)
Cont. same.
18. FURTHER TREATMENT INDICATED?-DESCRIBE
YES - Rest, Zomax, soak & Neosporin of ointment
19. MEDICATION GIVEN PRESCRIBED?-DESCRIBE
YES - Zomax
20. PATIENT HOSPITALIZED?
NO
21. PATIENT TREATED BY ANYONE ELSE?
YES - ER at Riverside
22. PATIENT DISPOSITION (PATIENT INSTRUCTED AS FOLLOWS)
ABLE TO RETURN TO DUTY-NO RESTRICTIONS-ON 7/26/82 DATE
23. ADDITIONAL COMMENTS SPECIFIC RECOMMENDATIONS OF TREATING PHYSICIAN
To work 7/26/82.
24. TREATING PHYSICIAN SIGNATURE
/s/ Hugh Givens, Jr.

JA-124

25. DATE

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CHESSIE SYSTEM

AUG 2 1982

Casualty Prevention Department
BALTIMORE MARYLAND

ACCIDENT/INCIDENT REPORT

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

1. ACCIDENT/INCIDENT NUMBER
INN-0195
2. AUTHORIZATION DATE
7/09/82
3. LAST NAME, FIRST NAME, MIDDLE INITIAL
McGlone, William C.
4. IDENTIFICATION NUMBER
2612047
5. SOCIAL SECURITY NUMBER
226-40-8431
6. ADDRESS - NUMBER AND STREET - CITY AND STATE
- ZIP CODE
732 - 34th St., Newport News, Va. 23607
7. OCCUPATION
Laborer
8. SEX
Male
9. DATE OF BIRTH
8/31/34
10. AUTHORIZING OFFICER
W.C. Gross, Gen. Foreman-Piers
11. RESP. CODE
2024
12. OFFICER'S TELEPHONE
(804) 380-5080
13. HISTORY (INCLUDING SPECIFIC LOCATION AND DESCRIPTION OF INCIDENT THAT CAUSED INJURY ON-SET OF ILLNESS)
Pt slipped and fell against some steel.

14. DATE OF INJURY OR ILLNESS
7/9/82
15. FINDINGS ON EXAMINATION (ATTACH RESULTS OF X-RAYS, TESTS OTHER STUDIES OPERATING NOTES DISCHARGE SUMMARIES ETC.)
Abrasion of epidermis - 3cm x 15cm
16. DIAGNOSIS
Abrasion of epidermis
17. TREATMENT GIVEN PRESCRIBED (SPECIFY)
Can not read.
18. FURTHER TREATMENT INDICATED?
NO
19. MEDICATION GIVEN PRESCRIBED?
NO
20. PATIENT HOSPITALIZED?
NO
21. PATIENT TREATED BY ANYONE ELSE?
NO
22. PATIENT DISPOSITION (PATIENT INSTRUCTED AS FOLLOWS)
ABLE TO RETURN TO DUTY-NO RESTRICTIONS-ON 7/26/82 DATE
23. ADDITIONAL COMMENTS SPECIFIC RECOMMENDATIONS OF TREATING PHYSICIAN
Can not read.
24. TREATING PHYSICIAN SIGNATURE
/s/ Hugh Givens, Jr. MD
25. DATE
7/9/82

RECEIVED
CHESSIE SYSTEM

JULY 21 1982

Casualty Prevention Department
BALTIMORE MARYLAND

**VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF NORFOLK**

LAW DOCKET NO. L86-335

ROBERT T. GOODE, JR.,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

September 19, 1986

Before:

HONORABLE CHARLES R. WATERS, II, JUDGE

* * *

[T:12]HERBERT R. CROWDER, called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

JOHN Y. RICHARDSON, JR., appearing for defendant.

By Mr. Richardson:

Q Mr. Crowder, state your name, please.

A Herbert R. Crowder.

Q And where do you reside, Mr. Crowder?

A 505 Bonsack Court, Chesapeake.

The Court: Would you spell your last name?

The Witness: C-r-o-w-d-e-r.

By Mr. Richardson:

Q And where you are employed?

A Norfolk Southern Corporation.

Q Your job?

A Master mechanic.

Q Can you tell the Court briefly your career with the railroad, when you came and the ranks you came up through?

A It [sic] was hired in 1956 in Roanoke, Virginia, as a machinist's helper. I went from machinist's helper to machinist's helper apprentice. I was then furloughed, went to the car department as a labor foreman. From there to Williamson, West Virginia, as a gang foreman. Back to [T:13] Roanoke, Virginia, as gang foreman. Promoted to assistant car foreman in Roanoke. Back to Williamson, West Virginia, as a car foreman, St. Louis, Missouri, as a general foreman, Bellevue, Ohio, as general foreman, Moberly, Missouri, as assistant master mechanic.

Back to Roanoke, Virginia, as a mechanical supervisor in charge of personnel, to Decatur, Illinois, as master mechanic, and now master mechanic in Norfolk.

The Court: It would take a brilliant witness just to remember all that.

By Mr. Richardson:

Q Mr. Crowder, how long have you been at Norfolk?

A I've been at Norfolk since 1979.

Q You have been a master mechanic all that time?

A No, sir. About four and a half years.

Q As master mechanic, what department are you responsible for?

A I have responsibility for the mechanical department which covers the car shop repairing freight cars, locomotive shop servicing and repairing locomotives, and the coal pier operation as far as the mechanical department is concerning being here in Norfolk. I also have facilities at Crewe, Virginia, and at Richmond, Virginia, and have jurisdiction over the areas from Norfolk to but not including Lynchburg.

[T:14]Q All right. Is Mr. Goode, the plaintiff, in your department?

A Yes, sir, he sure is.

Q As well as Mr. Jones and Mr. Bates standing outside?

A Yes, sir, they are.

Q Are you familiar with the term motive power department?

A Yes, sir.

Q Is that the same thing as the mechanical department, would you describe it?

A The motive power department is I won't say a misnomer. It's a term that's been attached locally to almost exclusively the pier department, if you may. It is all mechanical department but that—when we use the terminology here, we are normally talking about the pier group.

Q Okay. Do you know Mr. Goode's title?

A Yes, sir.

Q And what is that?

A He's a machinist.

Q And is he assigned to a particular group within your department?

A Yes, sir, he is.

Q What department is that? Is that the pier department you were describing?

[T:15]A The pier department, yes.

Q Does that also go by the motive power pier department?

A That's correct.

Q How long has he worked in this department, Mr. Crowder?

A I believe, recollection, about 1979 the most recent. He was employed once before, but I don't recall those dates.

Q Okay. Is it your understanding he came back after being employed outside the railroad in 1979?

A Yes. All I know is he was employed before and came back. I wasn't sure what the circumstances were.

Q What did he come back as? If you know. If Mr. Bates knows—

A I'm not sure. I don't know. I'll leave it that way.

Q Other than the machinists that are assigned to the motive power pier department, what other crafts or jobs are assigned to the motive power pier department?

A We have electrical workers, both electricians and helpers. The electrical helpers cover somewhat of a wide scope. They attend the lines for tying ships up and allowing them to leave. They also operate some of the equipment. They work as helpers not only for electricians but for other [T:16] crafts as needed.

We have pipe fitters, we have not as shop craft but we also have laborers that are under our jurisdiction.

Q You have described, I think, what the operators do within the electrical craft; is that correct?

A That's correct.

Q What do the pipe fitters do?

A Prepare and renew lubricating lines, air lines, water lines, oil lines.

Q What do the electricians who are not operators do?

A The electricians, of course, look after all our motors, circuit breakers, power contractors, programmable controllers, electrical switches.

Q Are any trainmen or members of UTU assigned to the motive power pier department?

A No, sir, they are not.

Q Are any trainmen allowed to perform any of these repairs or to operate any of the equipment that's within the motor power pier department?

A No, they are not allowed to repair anything or operate the equipment.

Q Are they allowed on piers?

A Can I rephrase that?

Q Yes, sure.

[T:17]A There is one piece of equipment that the trainman would operate. We have winches where we winch cars if they stall on the dumper. In the same connection, we have what is known as a rabbit. It's a mechanical feature that has an arm on it that will come up underneath the car and grab the car by the axle, if you may, and move it. It's a matter, on the rabbit, of pushing a button. The rope [sic] or the winch is something that can be operated by a brakeman.

Q We may get to that when we are describing the operation.

The matter that we have had marked as Exhibit—Court Exhibit A, have you reviewed that this morning?

A Yes, sir, I have.

Q And are the facts that are related in here essentially correct?

A Essentially, to the best of my knowledge.

Q Any correction you would like to make?

A The only thing that I saw that maybe could be misconstrued was that machinists repair freight cars. That's yes and no. There are times in emergency conditions where they will take a burning torch and trim a car if it's too wide for the dumper. And that's all that's ever has to be done to it. It's ready for service after that. So that could be construed as repaired, but they don't normally, as such, repair car equipment.

[T:18]Q Okay. There was also, I think you discussed with me, whether the 35 number of machinists was correct.

A That's correct. I believe the exact figure was 29 machinists, which did not include gang leaders, and all of those are not assigned to the coal pier operation as such.

Q Okay. Of the 29 machinists, how many are assigned to the coal pier in the Norfolk terminal?

A 16, I believe it was.

Q Okay. So the difference between the 35 number I put in here and the 29 is the gang foremen?

A Gang leaders.

Q Okay. All right.

Mr. Richardson: If this could be admitted into evidence now, I would certainly offer it.

The Court: Well, now—

Mr. Richardson: I am just trying to save having to ask him all those questions. I am going to elaborate on the critical ones. I think that Mr. Wilson, maybe at the conclusion of his testimony if I re-cover it, you may not have any—

The Court: I will admit it into evidence solely as evidence of what this witness would testify to but not for the truth of it.

Mr. Richardson: Okay. That's fine.

EDDIE W. WILSON, appearing for the plaintiff.

Mr. Wilson: All right, sir. To save time, that [T:19] is agreeable. It was my understanding that it was going to be entered simply as a statement of facts with the brief that this witness would corroborate through his testimony. That is the only basis to have its admission at this point.

Mr. Richardson: That's right. To save two hours of time, I am just trying to offer it as opposed to having him recite it on the stand. I think he will recite the areas you are concerned with. If not, I am sure you will bring it out in cross-examination.

Mr. Wilson: The only thing I can say is there are some opinions and conclusions in there which may be Mr. Richardson's as opposed to Mr. Crowder's. I will ask the Court to take note of that when you are reading it.

Mr. Richardson: I'm sure he will.

By Mr. Richardson:

Q .Now, how are machinists—

Mr. Richardson: Excuse me, your Honor. I'll wait until you are ready.

The Court: That's all right. Go ahead.

By Mr. Richardson:

Q Mr. Crowder, how are machinists assigned to the piers as opposed to anywhere else in the Norfolk terminal?

A Machinists, of course, have seniority. There are jobs advertised or railroad talk bids and they bid on their day and their shift predominantly. The third way that [T:20] they bid on jobs is the location. All of the machinists on Norfolk terminal are on the same seniority roster.

If their seniority warrants, they can bid jobs at the coal piers, pier operation, they can bid them for the maintenance gang, which predominantly works at 38th Street car shop, although not necessarily, or they can bid a job at the roundhouse.

Q The roundhouse being?

A Where locomotives are serviced or maintained.

Q Do they move around or generally stay in place as machinists at Norfolk terminal.

A There is some slight movement, but generally speaking you see the same people on about the same jobs.

Q Are the other crafts, the other unions of the railroad, similarly mobile depending on bidding jobs?

A Yes, sir.

Q What do the machinists do in general? If you would define a machinist, how would you do that?

A In the pier operation or in all?

Q Let's say in all first.

A Okay. Well, first of all, I will try to define the difference between electrical and mechanical. Anything that has much electrical to it would go to the electrical craft or the electrician. When I say much, motors don't come under machinists, although they will at times help put them [T:21] in or take them out.

Gears, for instance, almost never come under an electrician, although there are fringe areas that they could.

So anything that is gear driven, anything that has bearings, generally speaking, these are machinist's jobs. Gears, hydraulic systems, pumps. Hydraulic pumps in most cases are attached to an electric motor but the pump part generally would be machinist.

The changing of wheels and pushers, the changing of wheels and barneys. The barney neck, the barney head, the retarders on the dumpers, the hammer mills on the dumpers, the trunnion wheels and equalizers on the dumpers, the—

Q I think we are moving ahead. What do the machinists assigned to the piers do? What equipment do they work on?

A Well, essentially that's—I guess I'm still thinking about the piers. These are the things that the machinists at the piers will do.

Q Okay. Can you distinguish for the Court what that equipment is that the machinists assigned to the piers work on?

A It's—

Q I know you are going to be repeating yourself, but I'm not sure it's clear.

A The equipment I am talking about at the piers, [T:22] the barney, the pushers, the dumpers, are all equipment that we use in our business to dump coal. A pusher will push the car to the barney. The barney will take it, the car, from where the pusher stops up an incline and put it on a dumper. Of course the dumper will roll over. It dumps the car upside down. It has retarders on it that hold it in that position. As it moves onto the dumper, it will stop it where it has to be stopped for the arms to hold the car down.

Q Mr. Crowder, I have shown you some photographs this morning and they are the photographs I handed to the Court earlier which I think we agreed to. Have you looked at those photographs?

A Yes, sir, I have.

Q Are they accurate portrayals of the area out there at Lambert's Point where we are discussing?

A Yes, sir.

Mr. Richardson: If the Court would allow you, could he step down and show you on these photographs the areas we are talking about? There are the originals.

The Court: Sure.

By Mr. Richardson:

Q Maybe this is the one to start with. Could you describe the equipment you were just referring to with relation to this photograph which I believe is Exhibit—

The Court: It doesn't matter which exhibit it [T:23] is.

By Mr. Richardson:

Q What does the photograph show?

A It shows the dumper. This is the dumper here. This is the incline I was speaking of. And the barney is not shown here, but the barney pushes the cars up onto the dumper, and of course on the dumper are where the retarders are, or at least there are retarders. There are other retarders involved.

As the barney pushes one or two loads on there, it kicks off two empties. They come out through here, and we are looking at the south. This is the north dumper. This will come down and the car will come out on somewhat of a flat area where we have spoke of a rabbit system. It will pick the car up and kick it down or help

motivate it on through some more retarders out to a kick-back. Now, this picture does not show you the kickback or the south, but it is essentially the same as the one from the north. It goes down and rolls up this incline, and while it's up the incline you've got a switch that automatically throws so when it comes back in his direction going to the empty yard it goes on down through another series of retarders.

Q Mr. Crowder, it's understood, I think, that Mr. Goode was hurt while he was repairing a retarder. Can you show the Court where that retarder is?

[T:24]A It would be on this dumper, on the south side dumper.

Q Can you tell the physical location with respect to the track?

A Well, the retarders are within the gauge of the track. Is that what the question is?

Q Yes. How does it act on it? What is its purpose?

A Its purpose is to retard and to hold the freight car, the hopper car, once he gets to the dumper. In other words, the car is revolving as it comes on. Where we want it to stop we will apply the retarder to stop it and then hold it until all motion is stopped.

Q Can you show the Court what equipment the motive power department and machinists particularly have responsibility over the maintenance and repair of in this photograph, or would this photograph probably be better?

A This would give a more general view. This—

Q What does this photograph show?

A I'll speak in railroad east or west, if you may, because geographic is just the opposite. But railroad east—

Q Towards the water?

A Towards the water, going this way, this is the thawing shed.

Q The white building?

[T:25]A The white building. This is the south one and the north one.

Q What does the thaw shed do?

A In the winter months, January and February predominantly we electrically heat these buildings which through infrarays thaws the cold from the skin of the car. It doesn't thaw all the way through.

Q How long is a car in those thaw sheds?

A 20 minutes is a good time. There is no time limit.

Q What equipment in that shed are you responsible for?

A We are in charge of the heaters, their installation, maintenance of the heaters, which comes under the electrical craft, and there are two pushers that operate in each of these buildings which come under both the electrical and machinists.

The Court: You are talking about this pier?

The Witness: Here.

By Mr. Richardson:

Q After the car leaves the thawing shed what does it do?

A Then the barney picks it up, and, if I may, this area here is what we are seeing here. The pusher will push it down to about where this picture stops and then the barney [T:26] will bring it up to the dumper. There is a brakeman that is stationed down in this area or right here that will physically cut the two cars in two or one car in two. The mechanism is the on car to do so.

Q Is he a member of your department?

A No, he is not.

Q All this equipment you're talking about, the barney and pushers, is that equipment within the jurisdiction of your department?

A Yes, sir.

Q Okay.

A Again, the barney will pick it up onto the dumper and all of this is semi-automatic but is activated by a man that works under our jurisdiction, my jurisdiction. They are electrical workers but they are helpers and they are referred to in our terminology as operators.

Q What, after the coal is dumped, happens to it?

— A After the car is dumped, it goes down into—

Q I'm talking about the coal itself.

A The coal will go down into hoppers, which, in essence, is in this area, which feeds down, and the hoppers are a funnel type that go down to hopper feeder belts which take the coal and put it on A or Al belt. There is two series of belts that treat this whole thing. And it takes it from A belt to B belt to C belt.

[T:27]Q What is this white thing in the upper right-hand corner?

A That's the D belt. D and D1 belts. The coal is dumped here, it goes down and comes crossways. It comes over to what we referred to or is referred to as the BC house. It's just a transfer point where the belt dumps from B belt onto C belt.

Q Is this the transfer house pointed out here?

A That's correct.

Q From where does the coal go from there?

A It does on the C or Cl belt out the length or to the loaders. Not necessarily the belts go the length but the coal will come to the loaders.

Q And from the loaders to the ship?

A From C belt it goes to D belt and E and finally F belt and into the ship.

Q All this equipment you have described, the conveyor system, the shiploaders after the coal is dumped is also within your department's jurisdiction?

A Yes, sir.

Q Are they operated by people in your department?

A Yes, sir.

Q Are they maintained and repaired by people in your department?

A The mechanical and electrical facets of it. The [T:28] structural part comes under the engineering department, which is not under my department.

Q When you say the mechanical, are you talking about just the machines out there?

A The wheels, the electrical motors, the trolley systems, idlers underneath the belt, the pulleys that convey the belts.

Q Okay. Has the plat that has been introduced as Exhibit 1 and the landmarks shown on that and the copies of these pictures, do they point to the landmarks you have been describing, the transfer shed, the dumpers?

A Yes.

Mr. Richardson: Your Honor, I don't want to add-

The Court: I can see it.

Mr. Richardson: Okay. I don't think there is any dispute [sic] on those, but I just wanted it clear for the record he attests to what those photographs show.

By Mr. Richardson:

Q Other than the equipment that you have described that being—is it fair to say that the jurisdiction of the motive power pier department shows somewhere around the thaw shed as far as equipment is concerned?

A Yes. That's a fair assumption.

Q How far is the thaw shed, approximately, from the river? How far is the dumpers?

[T:29]A I'm going to say the dumpers are five to six hundred feet and the thaw shed, depending whether you're talking about entrance or exit, six to seven hundred feet. Purely guesstimates now.

Q I understand that. Other than the equipment you have described which your department works on—and I say your department, the motive power pier department—that being the pusher, the barney, the dumpers, the thaw shed, the shiploaders and conveyor belt system—I am sure I have forgotten something—what other equipment does the motive power pier department work on generally, if anything?

A Well, their purpose in being there and their only purpose in being there is to maintain the coal dumping facility. Now, I guess I'm going to answer your question. A good bit of their work is out on these facilities that I've just gone through, the dumper and the loaders and belt system.

Q If you were to assign a percentage of the time they spent working, how much would they work on this equipment.

A 99 percent, I would hope.

Q They are supposed to work on it 99 percent?

A That's right.

Q Do they occasionally have any opportunity to fix rail cars? I notice you took exception to my term repair rail

cars in that factual stipulation. Can you explain what [T:30] they do on occasion?

A The main thing I took exception to was the word "repair." We will have cars that come off the dumper, for instance, that won't roll because the brakes have set up, and the machinist will take a cotter key out, knock a brake pin out, and release the brakes so that it will roll free.

Prior to coming into the thaw shed—not necessarily prior to, sometime it's after, but most of the time prior to coming into the thaw shed we have car inspectors that will signify that a car has a spread side, if you may. The limitation—

Q Too wide?

A That's right. The limitations are greater than will go through the area that it's supposed to, which will require, in some instances, a burning torch, oxygen settling [sic] torch, to trim a portion off. Sometimes this is final; you don't have to do anything else after you trim it. Other times the car is rendered bad order and will go to the car shop.

Q So when to repair cars, to use that term, and I know it's wrong, is to coordinate the car going through the unloading process?

A To facilitate the smooth dumping operation, yes, sir.

Q And that's only done on occasion?

[T:31]A That's right.

Q Do they occasionally rerail cars that were derailed in the area of the dumper?

A In the area of the dumper and the kickbacks, yes.

Q Do they release hand brakes on rail cars.

A We never—they don't. They could, but it's really not an assigned duty to them. They will assist—sometimes

when we have a car derailed it's necessary to tie the hand brake up for safety sake. So then if they tie it up, it would be their responsibility to untie the hand brake.

Q I also asked you earlier when we were meeting about the breaking up of frozen coal. For Your Honor's benefit, the reason I am asking you these questions is these facts are contained in Mr. Wilson's affidavits which he is going to submit to the Court. That's why I'm asking him this terminology. I'm not sure what it is either.

Are you familiar with that term?

A Yes.

Q Do machinists do that?

A Machinists could. It would not be an assigned duty unless they had to make a repair to a hammer mill.

Q What is a hammer mill?

A A hammer mill is a mechanism that we have in the hoppers below the dumper where the coal will come out of a hopper car into a pocket prior to going to the belt. And it [T:32] will—in wintertime after it's frozen it will come out in large chunks, to say the least, and a hammer mill is a mechanical means of breaking the coal up so that it will feed through to the belts and henceforth to the ship.

And if a hammer mill breaks down, then it could become the responsibility of the machinist to have to get some of it away so we can get in there and repair it.

Q So it is really related to the repair of the dumping facility?

A That's correct.

Q All right. Now, Mr. Goode, in his deposition, which I don't know if you had an opportunity to read and which will be submitted to the Court, said that he worked pri-

marily on forklifts and trucks as opposed to the coal operation. Is that true?

A No, I wouldn't—that's—I haven't read his deposition, but the reason I said 99 percent, we have two forklifts at the coal piers, six or eight trucks. But they would work on them, yes. There's no question from time to time they might, but not a predominance, no.

Q Is it generally the people assigned to the piers department generally don't spend their time working on forklifts and trucks, I take it?

A That's right.

Q If there was a piece of equipment down there [T:33] they worked on primarily in the coal loading or unloading process, what piece of equipment would that be? I am talking about machinists now. Would one piece of equipment be worked on more than others?

A Well, I think the dumper gives us, in general, more problems than others because of the many, many mechanical facets of it.

Q Okay. To you, you are familiar with the retarders that this gentleman was working on the day he was injured, are you not?

A Yes, I am.

Q I know you have described briefly earlier what that is. Can you tell us how a retarder works?

A The retarder is on a—let me back up just a little bit to give a thorough picture of them.

The track that comes onto the dumper of course is standard gauge for the railroad. It is secured to a table. For better terms we call it a platen. It's a movable thing. The retarder sits inside the gauge of the rail. As the car comes on and we wish to slow it down and/or to finally stop it, then the retarder activates the operator—the op-

erator activates the retarder which applies pressure into the inside wheel face of the wheel to stop at that location.

Q Is this retarder different than other braking systems used on the railroad?

[T:34]A It's different in general than other retarders that are used for the same purpose because the other retarders will squeeze each wheel from each side.

Q Why is this retarder different than those others?

A Because of the structural limitations that we have to work within and again the fact that it's on a movable table.

* * *

[T:37]Q You noted the difference, I believe, between these retarders and other retarders. Did you explain that to the Court?

A I thought I did but for -

Q Okay.

A The retarders on the dumper which is within the confines of the platen, instead of squeezing both sides of a wheel to retard this movement just applies pressure to the inside portion of a pair of wheels.

Q And that is because of the pier 6 dumper structure?

A The structural limitations and the fact that the platen does move.

Q To dump the car?

A That's right.

* * *

By Mr. Richardson:

[T:38]Q Mr. Crowder, did you—as you testified earlier, you showed the Court where those retarders are located on the dumpers; is that correct?

A Yes, I did.

Q Is this dumper operation something that is solely used here in Norfolk or is it used all through the railroad?

A The pier 6 dumping operation at Norfolk is not the only one in the world by any means. It's the only one of its type in this portion of the country or the United States, to my knowledge, which does—I'm not an authority on that. But we have other dumping operations. We have a pier 5 right beside pier 6 that dumps coal but by another method. We have a coal facility at Sandusky, Ohio, that dumps coal which is similar to the pier 5 operation.

Q Is it always dumped in vessels?

A Yes.

Q Is the retarder operation that you have described—as I understand it, that's the thing that Mr. Goode was repairing on the day he was injured; is that [T:39] correct?

A Yes.

Q Is that essential to this pier 6 dumping operation?

A It's a very integral part of it. If we couldn't stop and hold the car when it got onto the dumper, we would be sitting there all day either trying to pull the cars back or by some means get them back in position. Yes, it is important. If it doesn't work, we don't dump.

Q Does the dumper have to be shut down in order to repair or maintain this retarder?

A Yes, sir, it sure does.

Mr. Richardson: Okay. I believe that's all the questions I have of him, Your Honor. If Mr. Wilson has some.

CROSS-EXAMINATION

By Mr. Wilson:

Q Mr. Crowder, these coal cars that are brought to Lambert's Point, where do they originate?

A Coal fields of Southwest Virginia, West Virginia and Kentucky.

Q Are they loaded at the coal mines to be brought to Lambert's Point?

A That's correct.

* * *

[T:41]Q All right. And what is the purpose of the barney yard?

A The cars are classified and go up into these tracks. We perform the landing, which is entirely another subject, but we will take a car off of track 1 and maybe the next car comes off track 9. Then we have brakemen up here that will cut the car again with the mechanical mechanism the car is equipped with, leave the arrows with them, let them roll down and then we will classify it, if you may again, as they come into these switches.

Q Are the railroad brakemen the same people you called trainmen earlier?

A Yes.

Q Are trainmen people that are assigned both closer to the water and further away from the water than these retarders that you were speaking of on the dumper?

A Yes. A trainman will be stationed on the water end of each of the dumpers when we are in operation. There's also another trainman on the inshore end off the dumpers. There's one at the cutter station.

* * *

[T:43]The Court: Well, they ride it only for the purpose of hitching a ride? Why would they do that?

The Witness: When a car that has been put on the dumper that's misclassified—there are hundreds of classes

of coal—and they have to get it off, or we have a mechanical breakdown that we can't dump that car and have to get rid of it so we can repair it at the facility. So I can't say that it never happens, but's so remote that I can't remember the last time it was done.

By Mr. Wilson:

Q But you do agree that a trainman is customarily working in an area closer to the water than this retarder that you were speaking about; is that correct?

A He's assigned to work closer to the water than the retarders, yes.

Q What is his job?

A That trainman?

Q Yes, sir.

A He ensures that the cars get off the dumper and he classifies cars as they come off the dumper. A for instance, if you may, is we classify cars coming off the dumper between 100-ton and a 70-ton car and different railroad's ownership.

* * *

[T:46] By Mr. Wilson:

Q What does BC stand for?

A From B belt to C belt.

Q It's a belt change house; is that what it is?

A Yes, sir. You don't change belts, so that we are talking the same terms. It's where the coal transfers from one belt to another belt.

Q Okay. If you will, why don't you draw a circle now where the dumper operation is where the coal is dumped from the car at the retarders.

A (The witness complied.)

Q All right. And what are these lines that run between these two red circles?

A That's your B belt. B and 1 belt.

The Court: Underground, aren't they?

The Witness: Partially underground and partially above.

By Mr. Wilson:

Q If you will, why don't you draw an arrow between those two circles for us.

A (The witness complied.)

Q Now show me where the coal goes when it changes from one belt at the BC house onto another belt.

A (The witness complied.)

Q And what is its final destination there?

[T:47]A To another series of belts, but its final destination is shipped [sic] underneath the loader.

Q On the first set of arrows, this is coal en route to the ship and it can't be diverted for any reason?

A It can be diverted.

Q It can. Where?

A We have recircle bins up here in case of a catastrophe.

Q Can't you reverse the belts going into the BC house and load that coal in the railroad cars?

A No, sir.

Q Are you sure of that?

A I'm positive.

Q Is there any way that coal can be diverted from the time it hits the first belt under the dumper as opposed to putting it into a ship? Anyplace on land I am speaking of.

A On land?

Q Yes, sir.

A No.

Q If the other belt doesn't pick it up you don't have any way to divert the coal; is that true?

A No. It just piles up inside the BC house. If that belt were broke down and this one continued to operate.

* * *

REDIRECT EXAMINATION

[T:66] By Mr. Richardson:

Q Mr. Crowder, it wasn't clear on the record. The trainmen, the brakemen that Mr. Wilson asked you about that are in the vicinity of the dumper, they don't operate any of that equipment, do they, other than the rabbit that's on the back track?

A That and the winch. That's the only things that [T:67] they—

Q They don't go out to the piers as the machinists do to work on the shiploaders and those kinds of equipment?

A No, they do not.

Q They don't operate any of that equipment?

A No, they do not.

Q Mr. Goode, since he came back to work in '79, has he been assigned principally at the piers?

A To the best of my knowledge, he's been at the piers or that's where I've known him is at the piers.

Q He was assigned there when he was injured, was he not?

A That's correct.

Q And had been assigned for sometime prior to that; is that right?

A Yes.

Q There was some discussion about where these gentlemen report. Where do machinists such as Mr. Goode report in the morning?

A To the mechanical or the motive power building at the coal piers.

Q Can you show that to the Judge on this plat? I believe it is designated. Is that the motive power building?

A Yes.

Q And in this picture showing the thawing shed, is [T:68] that the two-story big building?

A That's correct.

Q Why is that building located down where it is?

A It was placed there—I don't know when it was built, but it was placed there to facilitate the piers to the coal handling equipment or the dumping equipment.

Q Approximately how far is that from the water?

A 150 feet, approximately.

Q Is it along the same line offset from the water as the dumpers are, approximately? Are they adjacent?

A Well, they are somewhat side by side. The dumper is a little bit further from the water.

Q Okay. Now, Mr. Wethington who Mr. Wilson asked you about, he is assigned to the maintenance gang?

A Yes, sir.

Q He is not assigned to the piers, I take it?

A His bid in job right now is the maintenance gang, yes.

Q And Mr. Goode, as you testified previously, didn't work at the roundhouse or on 38th Street hopper or the maintenance gang work that you have described; is that correct?

A Right. His bid job is for the piers.

* * *

RECROSS EXAMINATION

[T:71] By Mr. Wilson:

Q Do you have knowledge there is a U.S. Steel plant in Alabama that unloads rail cars and coal?

A I have no personal knowledge of that.

Q But you do have knowledge there other facilities that unload coal not related to ships or piers or anything else; isn't that true?

A That's correct.

Mr. Wilson: That is all I have, Your Honor.

Mr. Richardson: Thank you, Mr. Crowder.

Judge, do you have any questions?

The Court: I have no questions.

Mr. Richardson: I am going to get Mr. Bates if that's all right.

DILLARD RATES, called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Richardson:

Q Mr. Bates, you have been sworn in. Give us your name, please.

A Dillard Bates.

Q And where do you live?

[T:72]A 3612 Terry Drive, Norfolk, Virginia.

Q And by whom are you employed?

A Norfolk Southern Corporation.

Q And what is your job?

A General foreman of piers.

Q General foreman of piers?

A Yes, sir.

Q Who is your supervisor, your boss?

A Mr. H. R. Crowder.

Q That is this gentleman right here?

A Yes.

Q Are you also in the department of the motive power, the mechanical department?

A Yes, sir.

Q As general foreman of piers, are you Mr. Goode's boss?

A Yes.

Q Okay. And how long have you known Mr. Goode?

A I've known Mr. Goode since back in 1979 when he came with the railroad or before that.

Q Okay. Did Mr. Goode—are you privy to what Mr. Goode does on a day-to-day basis?

A Yes.

Q And why is that?

A Because I'm general foreman, his supervisor [T:73] answers to me.

Q And do you participate in assignments to gentlemen assigned to the piers department?

A Not directly. Indirectly.

Q Okay. Explain that.

A I have a machinist supervisor that Mr. Goode comes under who reports to me and he makes daily assignments.

Q Okay. But you participate in those decisions?

A Yes.

Q How many machinists do you all have down at the piers department?

A At the piers? I believe right now we have about 19.

Q Okay. And since '78 or '79 when Mr. Goode returned to the railroad, has he generally worked in the piers department?

A Generally, yes. I believe there was on period that he worked in the maintenance gang for a short period.

Q But primarily he's worked at the piers?

A Primarily at the piers, yes.

Q Okay. Did he come on as a line tender helper?

A Yes.

Q What does a line tender helper do?

A They help tie up ships or if they are not tying up ships they can be assigned to help the electricians or the [T:74] machinists or any general help that you need.

Q What equipment is the motive power piers department responsible for?

A They are responsible for the equipment and operation of the piers, the dumpers, pushers, loaders is their main responsibility at the piers.

Q The other classifications, I believe, in your department are pipe fitters, electricians and operators which are also in the electrical craft; is that correct?

A True.

Q What union is the machinists in?

A It's IM—and I'm terrible because I don't know the official designation of the machinist's union.

Q There are no trainmen or UTU people that work in your department—

A No.

Q —do they?

A re they allowed to operate or repair any of the equipment that is in your department?

A No. None of the trainmen, no.

Q What union are the electrical workers in?

A They come under IBEW.

Q Okay. And the pipe fitters?

A It's SCMIA. It's a sheet metal workers union that takes in pipe fitters and sheet metal workers.

[T:75]Q Are the line tenders a member of the IBEW, the electrical workers?

A Yes. The line tenders come under the electrical union, IBEW.

Q All right. Tell me in a general way what machinists such as Mr. Goode assigned to the piers do on a day-to-day basis.

A They are assigned to any mechanical trouble that we would have working the retarders on the dumpers, or they could be assigned to work the pushers or your barney-pushers up the hill; any trouble, breakdown and the repairs of them. Or out on the loaders, any problems we have, mechanical problems with couplings on generators or tack generators or mounting or the alignment of or pulleys. Changing pulleys. Bearings on pulleys. Bearings on wheels and loaders.

Q All the equipment you are describing is equipment used in the dumping of coal from the thaw shed railroad east?

A All used for the sole purpose of dumping coal.

Q Okay. Do they have occasion to deal with rail cars?

A On occasions if we get what we call a bulge side with a broken top coping rail, they will—so that they can get it on the dumper, they will make a burn on it. This is something to burn it so it can get clearance. Get it on the [T:76] dumper. Or if the kickbacks—at times we have what they call tight brakes. They will knock a pin out of the brakes so they will freely roll on through the empty yard.

Q Okay. Now, you are aware that Mr. Goode was injured when he was repairing a retarder?

A Yes, I am.

Q Can you tell the Court what a retarder is?

A A retarder is a mechanism on the dumper that allows the operator to stop the hopper cars on the dumper under the arms at the proper place.

Q Who operates this retarder?

A The operator, dumper operator.

Q Is he in the mechanical craft and also a member of the motive power department?

A Yes.

Q Assigned to the pier?

A Assigned to the pier.

Q Are you aware of retarders used generally throughout the railroad?

A Yes.

Q Do the retarders used on dumper 6 differ from the other type retarders?

A Yes. It differs from most other retarders generally on the railroad, yes.

Q First of all, why does it differ?

[T:77]A Because of the space and the—on the dumper they have what we call a platen. It's movable. Normally retarders in the yards squeeze a wheel from both sides. These retarders only squeeze to the inside of the wheels. Squeeze up against one side of the wheel. And through linkage makes it different the way it applies on the platen retarders.

The Court: Let me ask a question. If the retarder on pier 5 is different than all the other retarders in the world but does the same thing by a different method and it's different from the retarder on pier 6, what significance is that? Why do I care about that?

Mr. Richardson: I am not saying pier 5 and pier 6. I'm talking about pier 6.

The Court: Reverse them. What difference does it make?

Mr. Richardson: Again, Your Honor, I anticipate that Mr. Wilson will argue that these are the same throughout the railroad and therefore this gentleman is repairing equipment that everybody else would repair on the railroad. And I believe—

The Court: This is pier 5 we are talking about.

Mr. Richardson: Pier 6.

The Court: Well, now it's different from the one on pier 5, isn't it?

[T:78]Mr. Richardson: I don't know that.

The Witness: Some difference. Similar and the same but some difference between pier 5 and pier 6.

By Mr. Richardson:

Q Is pier 5's retarder also distinguishable from normal railroad retarders?

A Yes, it is.

Q How is that?

A It retards squeezing on the inside of the wheels.

The Court: But they all do the same thing, don't they?

Mr. Richardson: Stop the car.

The Court: Yes.

Mr. Richardson: Yes, sir.

By Mr. Richardson:

Q Now, I have also shown you the photographs and the plats, have I not?

A Yes.

Q Do the symbols on there show the relevant landmarks down at the pier's area?

A Yes.

Q Where does Mr. Goode report to work?

A He reports to the motive power department at the piers.

Q Where is that building located?

[T:79]A It's located on the waterfront. The railing where we do power work.

Q Is that where your office is?

A My office is in this building, yes.

Q Mr. Bates, on a day-to-day- basis, how much time does Mr. Goode and similar persons, machinists, assigned to the motive power piers department work on the dumpers?

A On the dumpers alone?

Q Yes.

A It can vary. A lot of times they can spend the entire day on it. It varies as to how much problem or how much wear you have in your retarders or what you have.

Q Do they spend the majority of the time working on dumpers, shiploaders, conveyor belts, the thawing shed equipment? Is that the primary portion of their time?

Mr. Wilson: Your Honor, I think he's testifying again.

The Court: He was testifying.

Mr. Richardson: I am testifying and I know what he's going to say.

The Witness: 98, 99 percent of the time is spent directly with the coal loading operation.

By Mr. Richardson:

Q Mr. Bates, do these gentlemen spend a lot of time working on forklifts and trucks?

[T:80]A Not a lot of time. We do have two forklifts that we work on, but a very small percentage of the time would be working on any forklifts or trucks.

Q What about fixing these rail cars you talked about earlier?

A No repair of rail cars. Just work to get them to move out. No repairs of rail cars.

Q Okay. Once coal is put on the conveyor system, that being the conveyor belt underneath the dumper, does that coal generally go directly to the vessel without stopping?

A It goes to the vessel, yes, without stopping, to transfer points to load it. It's the only pace it can go.

Q It can't be diverted once it's put on that belt?

A It can be diverted to what we call bins out on the loader but it's then directly put back on the belt into the vessel because at times you have to put it in a bin when you reverse your movement of your load on your belts. You can't travel the coal when you put it in the bin and put it back on the belt to the vessel. There's nowhere it can go but to a vessel.

Q You are familiar, again, with the retarders that this gentleman was working on. To work on that retarder, does pier 6 operation have to be shutdown?

A Yes. If it was not retarding the cars properly because you couldn't stop the cars properly on the dumper to [T:81] dump them if they are not operating properly.

Q So to work on the retarders that this gentleman is working on, the operation would have to shut down? The dumping operation?

A Yes. On that one particular side.

Q Okay. If the retarders on the other side were inoperative, that part would have to be shut down also, would it not?

A Yes.

Q It wouldn't affect what went on behind it, would it, the thawing shed operation or the barney or the pusher or the scales?

A It wouldn't affect it other than it would mean you would have cars sitting there and you could not dump.

Q Is this dumper operation unusual for the railroad, this pier 6 dumper operation?

A It's the only operation of its type on the railroad.

The Court: Again, is that something that is referred to in some case law somewhere? I don't see the significance of that. I mean if I'm supposed to, tell me. Is that something that was mentioned in some case law somewhere?

Mr. Richardson: Your Honor, pier 6 dumper is different. Because it's different it requires different [T:82] retarders, it involves everything else. That's just what I am trying to point out to you. You may take it with a grain of salt, but I feel like it just shows that this is a coal unloading operation and that it is different than normal railroad work. If that is significant to you. It may be after reading the case law.

The Court: All right.

By Mr. Richardson:

Q Are you familiar with Robert Jones, a gentleman hurt as a machinist?

A Yes.

Q Where was he hurt?

A In the shop.

Q What was he doing?

A He was repairing a retarder cylinder.

Q Okay. Was he also a machinist?

A Yes, he is.

* * *

Q Mr. Bates, who controls the belts and the idle arm

assembly that goes from the dumpers to the ships? Who works on those?

A Who controls the belts and works on them?

Q Yes, sir.

A The motive power department, my department. The [T:83] operators in the cab control them. Working on them, maintenance of them, comes under my motive power machinist and electric.

Q Do they also work on the machinery out in the shiploaders themselves?

A Yes.

Q What about the trim track that the shiploaders move along?

A Pardon?

Q Is there a track out there that the shiploaders themselves move back and forth on?

A Yes. The loaders will travel the length of the pier, yes.

Q Who works on that trim track?

A The motors and all related equipment, machinists on bearings, mechanical end; electrical people on the electrical end.

* * *

CROSS-EXAMINATION

[T:86] By Mr. Wilson:

Q Mr. Bates, you mentioned the operation of line tenders. They aren't machinists, are they?

A Line tenders are not machinists, no.

Q They aren't in the same union as machinists, are they?

A No.

Q Prior to the unloading of railroad cars, would you agree that machinists participate in the repair of railroad cars?

A Machinists assist in the repair of railroad cars?

Q Yes, sir. Prior to them being unloaded in the south side dumper.

A No, not frequently, no.

Q Do they work on railroad cars?

A Machinists?

Q Yes.

A No, sir.

Q How about the burning? Where does that take [T:87] place?

A It takes place at—most of the time we will do it at the scales. If we can't do it at the scales, we will do it at the barney pier.

Q That is well before the car has been dumped, isn't it?

A Yes. Before the car is dumped, yes.

Q Maybe you didn't understand. The preface to my question was prior to the unloading of the cars on the dumper, don't machinists work on railroad cars?

A They will make burning on what we call bulge cars where the top coping rail is broken at an angle where we cannot put it on the dumper. We will burn it on a taper so it will go to the dumper.

The Court: What does it mean burning?

The Witness: You have an angle, and actually what it is sometimes I load the car and it will break in the middle. If the point is towards where it sits on the dumper you only have six inches of clearance. It's real close. And if you got a jagged edge sticking out, you can catch and turn what we call a clamp after they pull the cars on the dumper. We burn it in a taper or burn it off so it won't catch on these in this close clearance.

By Mr. Wilson:

Q And after the cars are unloaded on the dumper, isn't it true that machinists are called upon to help in the [T:88] rerailing of derailed railroad cars?

A Yes. If we have a derailment.

Q All right, sir. Don't they work on a device called a pusher, which has been described as a small electric locomotive, prior to the unloading of the cars?

A Yes. The pusher at the barney piers, yes.

Q Don't they work on the repair and maintenance of the barney which is a device used to push the cars up the incline before the dumper?

A Yes, they do.

Q Don't the trainmen activate the barney, railroad trainmen?

A No, sir. The railroad trainmen gives our dumper operators a signal that it is ready to pull and he actually pushes the button to pull the barney.

Q So they participate in the process of signalling which causes the barney to be started?

A Right. They have a green light down there. When he takes the retarders off a green light comes on. Then the barney comes.

Q So machinists do work in and about railroad cars with the movement of railroad cars both before and after they are dumped?

A Yes.

Q We have discussed a place called the BC house.

[T:89]A Yes.

Q And I understand that there are belts that run from the south side dumper to this BC house?

A Yes.

Q Does that belt have a designation?

A The BC House?

Q No. The belt itself. Is it like B belt?

A Yes. B and Bl belt, yes.

Q So B belt goes from the south side dumper to the BC house?

A Under normal operation, yes.

Q And then the coal is dumped on another belt that goes from the BC house to the ships; is that correct?

A That's correct.

Q What is the designation of that belt from the ships to the BC house?

A From the ship to the BC house? Under normal operation, B belt would dump onto C belt. C belt would go down the pier, up through the loader.

Q And that is when they put the coal in the ships, right?

A No, sir. It then dumps onto D belt.

Q So there is another belt involved?

A Which is a belt going across out to your apron. It belts onto E belt.

[T:90]Q Is there a shoot [sic] at the back of the BC house where you can place coal?

A There's a shoot [sic] at the back of the BC house?

Q At the back of the BC house.

A Yes. There is a cleanup place back there where the cleanup belts dump off and also a place back there where if you have a problem with your belt, if we ever do reverse it, it could dump it out on the ground, yes, sir.

Q So you could actually take the coal after it's left B belt and going onto C belt and you can reverse C belt and dump coal back out through the BC house; is that correct?

A That is not done except in special emergency cases. It cannot be just normally reversed.

Q My question is can you do that.

A It could on special conditions.

Q Has it ever been done?

A I have done it when I have come over a belt with a rip.

Q Couldn't you take the coal you dumped over the shoot [sic] and load it in the railroad cars?

A Yes.

Q As a matter of fact, there's a track that runs right down beside the BC house?

A Yes.

Q And there are railroad cars sitting back there [T:91] most of the time, isn't there?

A Right.

Q And they've got coal in them, don't they?

A Yes, sir.

Q And that coal is coal that came out of the railroad cars upon the dumper, isn't it?

A It's cleaned up coal, yes. It came from all over the piers.

Q And retarders are used to stop cars, aren't they?

A Yes.

Q And they are used all over the railroad system to stop cars, aren't they?

A Yes.

Mr. Wilson: That's all the questions I have, Your Honor. Thank you.

REDIRECT EXAMINATION

By Mr. Richardson:

Q Just a couple, Mr. Bates. Mr. Goode was a line tender when he initially came on the department, was he not?

A When he initially came to the piers.

Q Yes. In '79 or thereabout.

A Yes.

Q The gentleman helping Mr. Goode when he was hurt, Mr. Dowdy, he is a line tender, is he not?

[T:92]A Yes.

Q And line tenders are generally the first step to becoming an apprentice and then an electrician or machinist?

A Normally, yes. We pick apprentices from anyone that is interested and qualified.

Q How far from the water is this dumper?

A The dumper?

Q Yes, sir.

A I would take a guess of 500, 550 feet, approximately, from the water.

Q Okay. And how far from the water is the motive power building?

A About 150 feet to 175 feet, approximately.

Q How far apart are those two dumpers and the motive power department?

A The dumpers and the motive power building? It's about 300 feet. Somewhere in there. Just an estimate. Taking extreme one side to the other.

Mr. Richardson: Okay. I think that's all. That you Mr. Bates.

Mr. Wilson: I have no questions, Your Honor.

The Court: Thank you, sir.

* * *

EXHIBIT DESCRIPTION

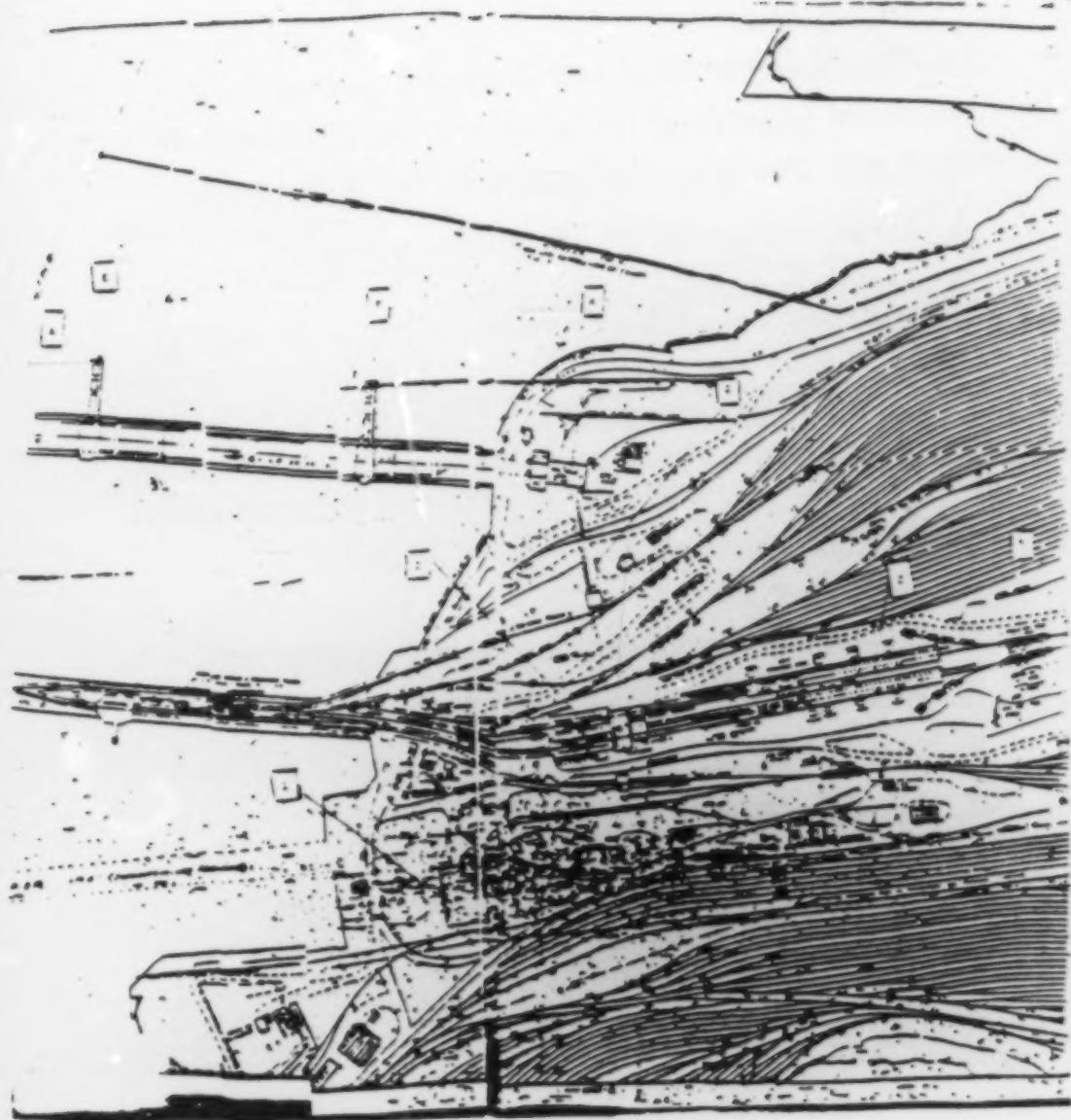
1. Plat of Lamberts' Point Terminal
2. Aerial photograph of Lamberts' Point Terminal
3. Aerial photograph of Lamberts' Point Terminal
4. Aerial photograph of Waterside facilities
5. Aerial photograph of dumpers

LANDMARKS IDENTIFIED ON EXHIBITS

- A. Pier 6
- B. Scales
- C. Thawing Shed
- D. Dumpers
- E. West Shiploader
- F. East Shiploader
- G. Conveyor System
- H. Transfer Shed
- I. Motive Power Building

JA-170

EXHIBIT 1



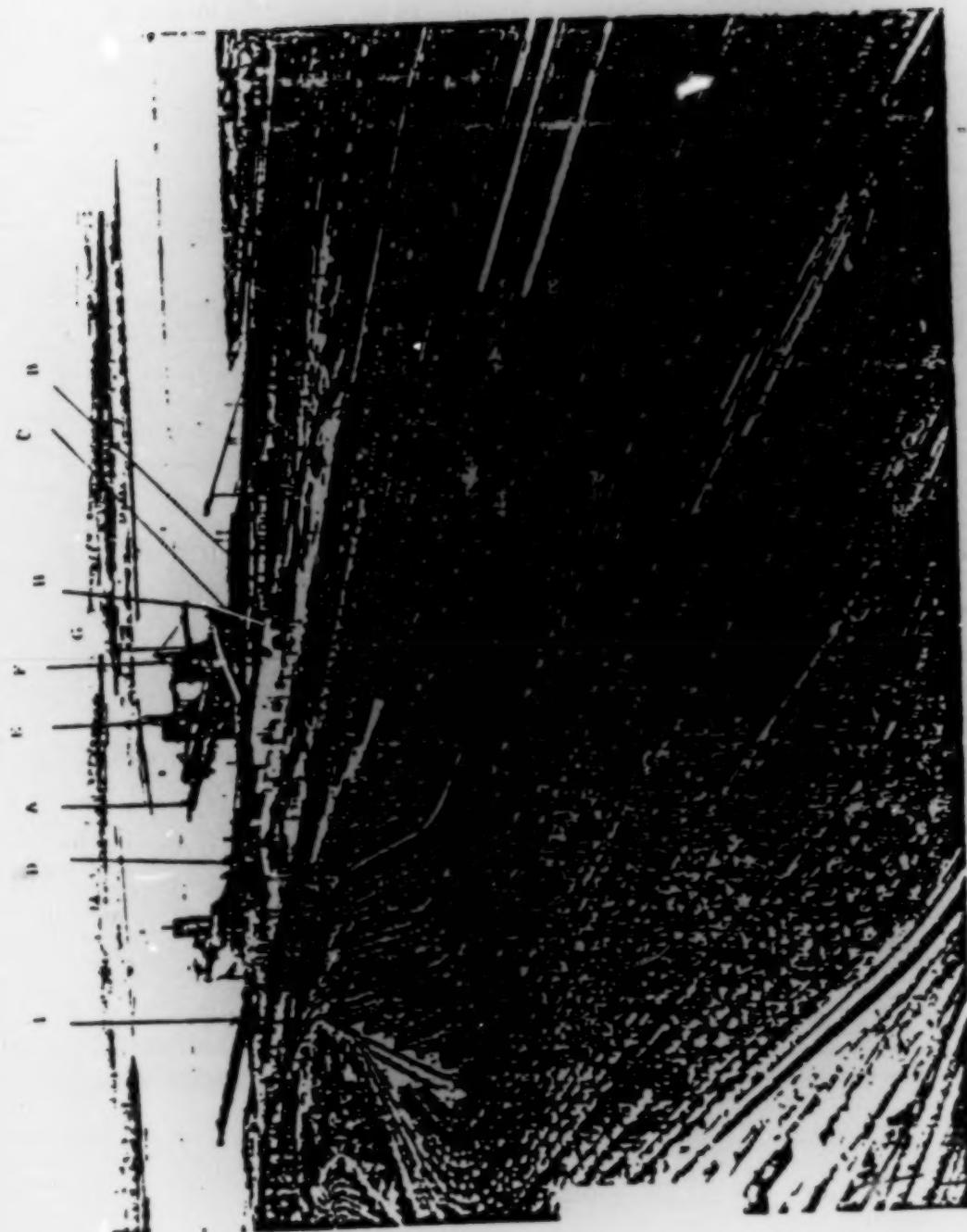
JA-171

EXHIBIT 2



JA-172

EXHIBIT 3



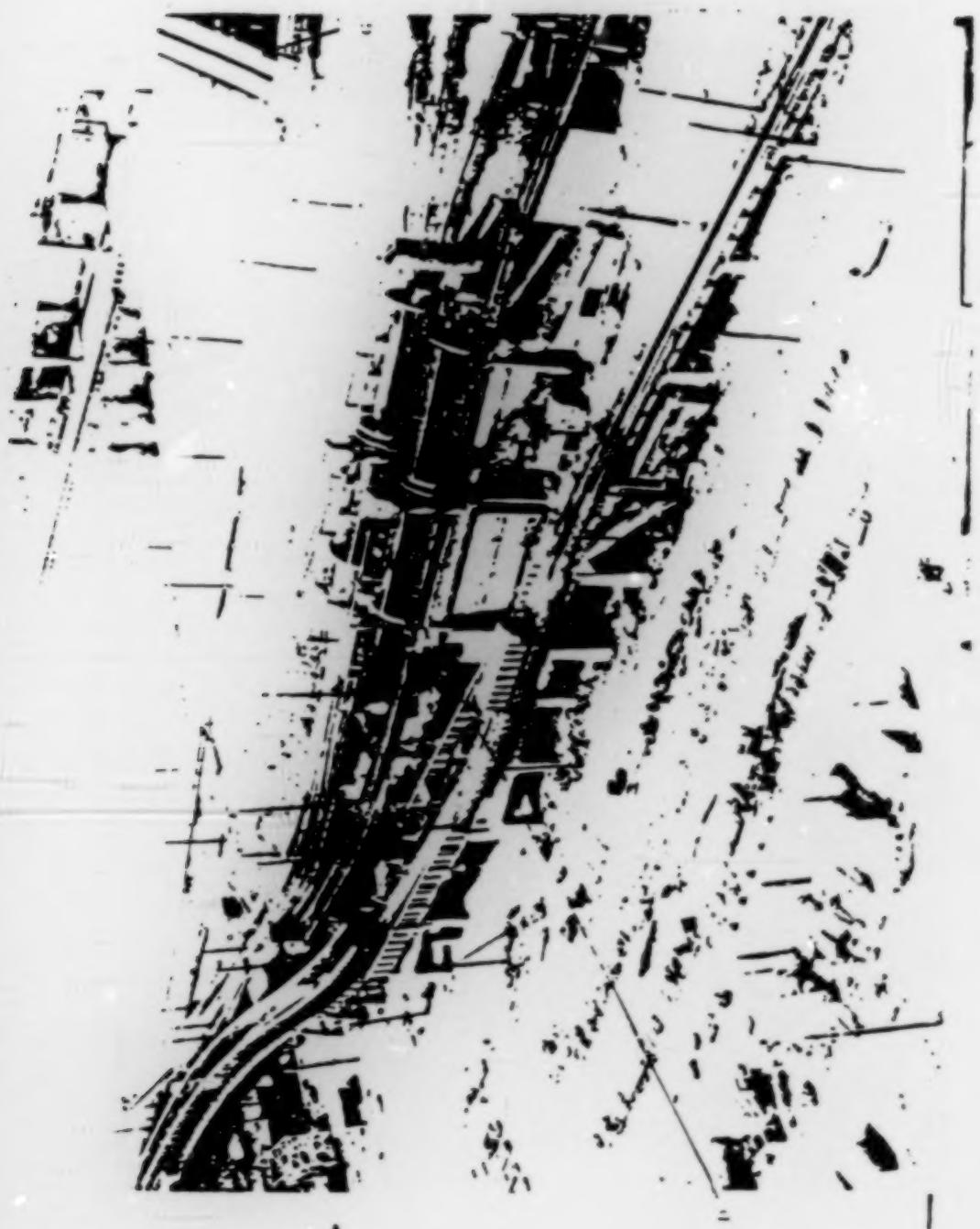
JA-173

EXHIBIT 4



JA-174

EXHIBIT 5



**VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF NORFOLK**

AT LAW NO. L86-335

ROBERT T. GOODE, JR.,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant.

**DEPOSITION UPON ORAL EXAMINATION
OF ROBERT T. GOODE, JR.
TAKEN ON BEHALF OF THE DEFENDANT
June 27, 1986**

[T:3] Robert T. Goode, Jr., called as a witness, having been first duly sworn, was examined and testified as follows:

EXAMINATION

JOHN Y. RICHARDSON, JR., appearing on behalf of Norfolk and Western Railway Company

By Mr. Richardson:

Q Mr. Goode, my name is John Richardson, and I represent the railroad in this matter.

If there are any questions you don't understand, tell me, and I will try to make them [T:4] understandable. If there is anything you want to change during the deposition, tell me to stop, and I will let you change it.

I am trying to find out what your story is and how you got hurt. All I am expecting are frank answers, which I am sure you will give me.

Q Where do you live, Mr. Goode?

A Norfolk.

Q Give me your address.

A 928 Defoe Avenue.

Q And are you married?

A Yes.

Q What does your wife do?

A She is a police officer.

Q With the city of Norfolk?

A Yes.

Q What is her name?

A Nancy.

Q Any children?

A Yes.

Q Names and ages.

A Jennifer, age 12.

Q Okay. Just one?

A Yes.

Q Okay. No other dependents?

[T:5]A No.

Q Okay. Are you a native of Norfolk?

A Yes, sir.

Q And did you go to high school here in Norfolk?

A Yes.

Q Where did you go?

A Maury.

Q When did you—did you graduate?

A Yes.

Q What year?

A Sixty-nine.

Q Did you do anything after graduating as for a education-wise or did you come right to work for the railroad?

A I went to Tidewater Community.

Q For how long?

A About three semesters.

Q Okay. Any particular area of study?

A Police science.

Q Okay. And is that the extent of your post high school education?

A Yes.

Q Okay. What was your first regular job after graduating from Maury?

[T:6]A I was employed with the railroad.

Q What was your seniority date?

A I am not sure.

Q Okay. About what time did you come to work?

A I was working for the railroad while I was in high school. It was probably in '69.

Q Okay. What did you come on as?

A Bridge tender.

Q Okay. How long were you bridge tender?

A And a painter's helper.

Q Both under B & B department?

A Yes.

Q How long were you a bridge tender and painter's helper?

A Approximately three years.

Q And as I understand it, that is under the bridge and building department; is that right?

A Yes, sir.

Q Is that how you classify it?

A Yes, sir.

Q Throughout your years with the railroad, have you always been in that department?

A No.

Q What did you do next after being a bridge [T:7] tender and painter's helper?

A I was drafted in the army.

Q Okay. And about when was that?

A Seventy, July of '70.

Q How long were you in the army?

A Approximately a year and a half.

Q What did you do in the army?

A Infantry.

Q Okay. Did you just exhaust your service or were you discharged for any particular reason?

A Just had an early discharge because the president said it was okay.

Q Okay. And then you came back to work for the railroad?

A Yes.

Q And that was 1972?

A Yes, sir.

Q Okay. What did you come back on as?

A Bridge tender.

Q How long did you stay a bridge tender this time?

A Approximately three months.

Q And then what were you promoted to?

A I resigned and went to work as a police officer.

[T:8]Q Okay. That's after three months in '72. Was that nothing to do with the employment at the railroad? You were just looking for a better job; is that it?

A That's correct.

Q How long were you a police officer?

A Six years and ten months.

Q Just patrolman or—

A Yes.

Q And why did you leave the police department?

A To come back to the railroad.

Q Any particular reason or just tired of being a police officer?

A Tired of being a police officer.

Q When did you come back to work?

A January 19th, 1979.

Q Okay. Did you go back to B & B department?

A No.

Q Tell me what you were employed as that time.

A I went into the motive power department.

Q And have you been in the motive power department from then on?

[T:9]A Yes.

Q To the present day?

A Yes, sir.

Q Tell me a little bit about the motive power department. What is its job primarily?

A What is my job?

Q Let's talk about the department first.

A Basically to run the east end of the railroad.

Q Okay. Is there equipment that the motive power department is particularly responsible for?

A Yes, sir.

Q Tell me about that equipment they are responsible for.

A The thaw sheds, the pushers, the barneys, the dumpers, the conveyer belts.

Q Is it fair to say they are responsible for everything on the railroad east of the thaw sheds.

A Including the thaw shed.

Q Is that where their line sort of stops and comes towards the dumpers?

A No, not really, because we work on equipment at Portlock.

Q What kind of equipment do you work on at Portlock?

[T:10]A Forklifts, railroad engines.

Q Do you do that at Lambert's Point also?

A Yes, sir.

Q Okay. If you had to say what motive power mainly dealt with on a day-to-day basis, would you say the equipment in the coal loading system from the thaw shed to east?

A No, we work on all of the equipment.

Q Okay. And—but I am talking about—do you understand my question?

I am saying, does the motive power department primarily work on the equipment in the coal loading process from the thawing shed to east? Is that your primary responsibility?

A No.

Q Do you spend as much time working on the forklifts as you do the coal loading equipment?

A Yes, sir.

Q Okay. You spend more time working on that stuff like railroad engines and forklifts as you do on the coal loading equipment.

A I would say more time spent on the forklifts and thaw sheds.

Q Okay. More time spent on forklifts than thaw sheds?

[T:11]A No, and thaw sheds.

Q Okay. And barneys and pushers?

What I am getting at is, Mr. Goode, do you spend more time working on thaw sheds and that kind of stuff than you do forklifts and that kind of stuff?

EDDIE W. WILSON, appearing on behalf of Robert T. Goode, Jr.

Mr. Wilson: Excuse me. John, if I could interject this. I am not certain it's clear what you are understanding—what you are asking. If you defined what you consider to be unloading equipment—

Mr. Richardson: I thought I had.

By Mr. Richardson:

Q Assume—

Mr. Wilson: We might not accept your definition, but—

Mr. Richardson: I understand that.

By Mr. Richardson:

Q I will lump everything that goes into the coal dumping and loading process from the thaw sheds east, railroad east as coal equipment. Is that okay? Can you accept that? I am not asking you to agree, but for the purposes of my question, assume that.

Now, percentage-wise, if you can do this, tell me how much time the motive power department spends [T:12] on the coal equipment as opposed to things like forklifts, railroad engines, and that kind of thing.

Mr. Wilson: Before you answer it, I want to object to the form of the question. There has been no foundation laid to show that the coal unloading facilities start at the thaw shed. I think it would be—we are assuming that for the purposes of the question.

Mr. Richardson: Right. I understand that. I am not saying my definition is definitive.

I am trying to get an idea of how much time the motive power department spends on equipment such as the thaw shed, the barneys, the pushers, the dumpers, and what I would classify as coal loading or dumping equipment. Okay.

By Mr. Richardson:

Q Can you answer that question?

A I am not sure.

Q Okay. Who would know that?

A I don't know that either.

Q Who is your supervisor?

A My immediate supervisor is Bobby Jones.

Q And who is his boss?

A Chain of command would be Arnold Meadows.

Q Head of B & B or motive power?

[T:13]A No, assistant general foreman.

Q Okay. Let's keep going. Who is next?

A Dillard Bates or D. T. Bates.

Q What is his title?

A General foreman.

Q All right. Anybody higher?

A Bobby Edwards is assistant master mechanic.

Q Mr. Crowder then?

A Yes.

Mr. Wilson: Is that Herb Crowder we are talking about?

Mr. Richardson: Yes.

By Mr. Richardson:

Q He is the master mechanic, right, Mr. Goode?

A Yes.

Q He is sort of in charge of the motive power department?

A Yes, sir.

Q Okay. Now, since you came back to work with the motive power department in January of 1979, what has been your job? What was your initial job in January of 1979?

[T:14]A Line tender and helper.

Q What does that do? What do they do?

A Basically help the electricians and machinists.

Q Do what?

A Perform repair work.

Q On this kind of equipment we have been talking about earlier?

A On anything.

Q What else did you do?

A Tied up ships on the pier.

Q Okay. Whenever a ship would come in or leave, y'll would tie and untie the ships?

A That's correct.

Q How long were you a line tender and helper?

A Three months.

Q Then what did you become?

A Machinist apprentice.

Q And that essentially means you work on all equipment that you were describing earlier? Is that what the machinist does?

A Yes, sir, works on cars, trucks, forklifts, railroad cars.

Q And how long were you apprentice?

[T:15]A It's a four-year apprenticeship.

Q Have you moved up to a machinist yet?

A Yes, sir.

Q When did that occur?

A I am not sure of the date.

Q All right. How long, a couple of years ago?

A Yes, sir.

Q And you are a machinist today?

A Yes, sir.

Q And I take it a machinist does the same thing a machinist apprentice does essentially?

A Yes.

Q Work on cars, trucks, forklifts, things like that?

A Yes, sir.

Q All right. Just clarify something for me, Mr. Goode. Do you actually go to the car shop and work on cars, rail cars?

A I don't go to the car shop and work on cars.

Q Where do you work on rail cars?

A At the scale office, in the thaw shed, and in the barney pit, and sometimes the dumper.

Q When cars get stuck there or something, is that when you work on them?

[T:16]A Yes, sir. And if something is wrong with the car, we work on it before it goes into the dumper.

Q When you work on a car, it's on the track between the thaw shed and the—whatever the yard is where they go after being dumped?

A Sometimes they are not on the track.

Q What do you mean "sometimes"?

A Sometimes they are derailed, and we have to put them back on the track.

Q Okay. It's generally out of necessity to keep the coal process running, is that fair to say?

A I guess so.

Q Okay. What I am getting at is, you just don't inspect car, and you don't—if you see something wrong that needs to be fixed, you don't stop the coal loading process to work on the cars?

A It would depend on the severity of what needed to be fixed.

Q Okay. Is that something that happens on a regular basis?

A No.

Q Okay. So what do you do most of the time?

A Perform repair work on the equipment for the railroad.

[T:17]Q Okay. All right, Mr. Goode, tell us what happened on the day you got hurt.

A Where do you want me to begin?

Q Let's start with when did you come on that day?

A At 7 a.m.

Q Is that your typical shift, 7 to 3?

A Yes, sir.

Q And when you came on, who do you go to for direction on what to do that particular day?

A Report at the lunchroom at the motive power building.

Q Where is the motive power building?

A Lambert's Point.

* * *

Q All right. Where with respect to the Elizabeth River is the motive power building? Is it down there near the piers or up near the claim department and superintendent's office?

A Approximately 150 yards east of the Elizabeth River.

Q Okay. Near the piers?

A Near them.

Q Okay. You report there. Who tells you what to do, if anybody?

A Bobby Jones.

Q Okay. What did he tell you to do on the day you were hurt?

[T:19]A To go to the south dumper and check and repair the retarders.

Q Okay.

A Retarders are what stops the coal cars.

Q They act like a cushion or something when they unload it?

A Braking system.

Q Is it after they have been unloaded or while they are being unloaded or prior to being dumped?

A Prior.

Q Okay. They are on the dumpers themselves?

A Yes, sir.

Q Tell me a little bit about how the retarders play a role in the dumping process.

A They stop the coal cars in place.

Mr. Wilson: Before you answer that, I object to the form of the question. You are assuming they are involved in the dumping process.

Mr. Richardson: Sure. I understand.

Mr. Wilson: Go ahead and answer it, Bob.

* * *

By Mr. Richardson:

[T:27]Q And how often do you have to replace the sword and pins?

A I don't know. Sometimes you have to replace them, and sometimes you don't.

Q Can you go years without replacing them? Is this something you do every month or every six months or—

A You check them more often, and I am not sure the length of time they last.

Q Okay. You weren't surprised to see they needed to be replaced?

A No sir.

Q Okay. Once you saw that, what did you decide to do?

A Contacted Bobby Jones and told him what the situation was, and he said to replace them.

Q Okay. And is this a big job?

A Yes, sir.

Q Does it require shutting down the dumpers?

A Yes, sir. *

Q Okay. Was the dumper shut down during [T:28] this time?

A Yes, sir.

Q There wasn't any coal being loaded?

A No, sir.

Q That is when y'all do the maintenance on the dumpers is when it's down like that?

A Yes, sir.

Q Okay. What does the—tell me a little bit about how you go about replacing these things.

A You have to have an acetylene and oxygen torch, and you take the pins, which are actually bolts, out of the linkage, and you heat up the keeper strap that is over top of one of the pins, that is a pin, not a bolt. You bend it out of the way, and you take the pin out, and usually or supposedly that is all that has to be done. You take the pin out and take the sword out.

On this particular day the bushing that the pin goes through was broke, and I had to take the acetylene and oxygen torch and push the bushing block off. Then I had to go back to the shop and get a new bushing block and new pin and come back to the dumper to replace it.

* * *

VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF NORFOLK

AT LAW NO. L86-335

ROBERT T. GOODE, JR.,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant.

AFFIDAVIT

COMMONWEALTH OF VIRGINIA
CITY OF _____, to-wit:

THIS DAY, before me, the undersigned, a Notary Public in and for the Commonwealth of Virginia, personally appeared Ronel Lee Croft, who, after being duly sworn, made oath that the following statements describe the duties and conditions of employment for a machinist holding seniority on Norfolk Terminal, Norfolk and Western Railway Company, Norfolk, Virginia.

12. A Norfolk Terminal railway machinist may be assigned duties at any geographical point on the Terminal. As an example, machinists work at Portlock Yard (approximately 6 miles from Lamberts Point Yard).

13. All machinists on Norfolk Terminal work from a common seniority list and may change jobs at will, based on their seniority standing on this list.

14. Machinists perform jobs on Norfolk Terminal ranging from the repair and maintenance of pier machinery; to the repair and maintenance of railroad locomotives; to

the repair of railroad cars; to the repair of hydraulic braking systems; to the repair of bridge raising mechanisms.

15. Norfolk Terminal machinists perform these duties at various geographic locations ranging from the Elizabeth River Piers, the 38th Street car shops and the locomotive round house, all at Lamberts Point Yard; to Portlock Yard (approximately 5 miles from Lamberts Port Yard); to Bridge #7 (approximately 7 miles from Lamberts Point Yard); to Crewe, Virginia (approximately 125 miles from Lamberts Point Yard).

16. Machinists assigned to the Motive Power Department at the Pier end of Lamberts Point Yard have job assignments of working on Pier machinery, both over the water and in the shop; also, work assignments involved with railroad cars and railroad equipment, *prior to the unloading of the cars*. Examples of some of these assignments:

1. the repair of railroad cars;
2. the rerailing of derailed railroadcars;
3. the repair and maintenance of pushers (small electric locomotives);
4. the repair and maintenance of the Barney;
5. the repair and maintenance of retarders; and
6. the release of handbrakes on railroad cars.

17. Retarders, such as those in use on the south side dumper at Lamberts Point Yard, are in use throughout the Norfolk and Western Railroad system and are common to all railroads.

18. The purpose and function of such retarders is to stop railroad cars.

19. The function of the retarders on the south side dumper is to stop railroad cars prior to the cars being unloaded.

20. The conveyor belt system used to load coal on ships begins after the unloading of railroad cars at the southside dumper.

21. After a car is unloaded it continues its cycle back to the coal mines to be loaded again, by continuing up a raised track, and is then returned by gravity to an empty car yard.

22. Different crafts of employees work beside the track on which the south side retarder is located. As an example, railroad brakemen work beside this track, and they are geographically closer to the water and piers than is a machinist working on a retarder.

23. Machinists working on the pier end of the yard are worked side by side, over land, with railway maintenance of way employees:

1. rerailing derailed railroad cars;
2. breaking up frozen coal from railroad cars.

24. As a railroad machinist I am required to pay money to the Federal Railroad Retirement Board.

25. As a railroad machinist I am eligible for retirement benefits under the Federal Railroad Retirement system.

26. As a railroad machinist I am eligible to receive Railroad Retirement Board unemployment benefits when furloughed or dismissed from this job.

27. As a railroad machinist I am eligible to receive Railroad Retirement Board sickness benefits when I miss time from work due to illness or a disabling injury at home.

28. My work contract is negotiated under the Federal Railway Labor Act.

29. My rights to hearings, and appeals rights of discipline imposed by the Norfolk and Western Railroad, are rights under the Federal Railway Labor Act.

30. The railroad cars repaired by the machinists are used in interstate commerce.

31. The safety standards for railroad cars stopped by the retarders on the south side, Pier 6, are set by Federal regulations, the Safety Appliance Act.

32. A machinist's work on Norfolk Terminal, with the exception of work on machinery that handles coal after the coal cars are unloaded, is in no way even remotely related to the loading or unloading of ships, nor is this work on piers, nor is this work over water. This work deals with machinery used in the repair of coal cars, the repair of locomotives, vehicles, bridges and track machinery such as retarders.

/s/ Ronel Lee Croft

Sworn and subscribed to before me, in the City of Norfolk, State of Virginia, this 11th day of September, 1986.

/s/ Martha Early

My commission expires: 10-10-88

VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF NORFOLK

AT LAW NO. L86-335

ROBERT T. GOODE, JR.,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant.

AFFIDAVIT

COMMONWEALTH OF VIRGINIA

CITY OF _____, to-wit:

THIS DAY, before, the undersigned, a Notary Public in and for the Commonwealth of Virginia, personally appeared Raymond D. Wethington, who, after being duly sworn, made oath that the following statements describe the duties and conditions of employment for a machinist holding seniority on Norfolk Terminal, Norfolk and Western Railway Company, Norfolk, Virginia.

1. A Norfolk Terminal railway machinist may be assigned duties at any geographical point on the Terminal. As an example, machinists work at Portlock Yard (approximately 6 miles from Lamberts Point Yard.).
2. All machinists on Norfolk Terminal work from a common seniority list and may change jobs at will, based on their seniority standing on this list.
3. Machinists perform jobs on Norfolk Terminal ranging from the repair and maintenance of pier machinery; to the repair and maintenance of railroad locomotives; to the re-

pair of railroad cars; to the repair of hydraulic braking systems; to the repair of bridge raising mechanisms.

4. Norfolk Terminal machinists perform these duties at various geographic locations ranging from the Elizabeth River Piers, the 38th Street car shops and the locomotive round house, all at Lamberts Point Yard; to Portlock Yard (approximately 5 miles from Lamberts Point Yard); to Bridge #7 (approximately 7 miles from Lamberts Point Yard); to Crewe, Virginia (approximately 125 miles from Lamberts Point Yard).

5. Machinists assigned to the Motive Power Department at the Pier end of Lamberts Point Yard have job assignments of working on Pier machinery, both over the water and in the shop; also, work assignments involved with railroad cars and railroad equipment, *prior to the unloading of the cars*. Examples of some of these assignments:

the repair of railroad cars;

the rerailing of derailed railroad cars; the repair and maintenance of pushers (small electric locomotives);

the repair and maintenance of the Barney;

the repair and maintenance of retarders; and

the release of handbrakes on railroad cars.

6. Retarders, such as those in use on the south side dumper at Lamberts Point Yard, are in use throughout the Norfolk and Western Railroad system and are common to all railroads.

7. The purpose and function of such retarders is to stop railroad cars.

8. The function of the retarders on the south side dumper is to stop railroad cars prior to the cars being unloaded.

9. The conveyor belt system used to load coal on ships begins after the unloading of railroad cars at the southside dumper.

10. After a car is unloaded it continues its cycle back to the coal mines to be loaded again, by continuing up a raised track, and is then returned by gravity to an empty car yard.

11. Different crafts of employees work beside the track on which the south side retarder is located. As an example, railroad brakemen work beside this track, and they are geographically closer to the water and piers than is a machinist working on a retarder.

12. Machinists working on the pier end of the yard are worked side by side, over land, with railway maintenance of way employees:

rerailing derailed railroad cars; breaking up frozen coal from railroad cars.

13. As a railroad machinist I am required to pay money to the Federal Railroad Retirement Board.

14. As a railroad machinist I am eligible for retirement benefits under the Federal Railroad Retirement system.

15. As a railroad machinist I am eligible to receive Railroad Retirement Board unemployment benefits when furloughed or dismissed from this job.

16. As a railroad machinist I am eligible to receive Railroad Retirement Board sickness benefits when I miss time from work due to illness or a disabling injury at home.

17. My work contract is negotiated under the Federal Railway Labor Act.

18. My rights to hearings, and appeals rights of discipline imposed by the Norfolk and Western Railroad, are rights under the Federal Railway Labor Act.

19. The railroad cars repaired by the machinists are used in interstate commerce.

20. The safety standards for railroad cars stopped by the retarders on the south side, Pier 6, are set by Federal regulations, the Safety Appliance Act.

21. A machinist's work on Norfolk Terminal, with the exception of work on machinery that handles coal after the coal cars are unloaded, is in no way even remotely related to the loading or unloading of ships, nor is this work on piers, nor is this work over water. This work deals with machinery used in the repair of coal cars, the repair of locomotives, vehicles, bridges and track machinery such as retarders.

In addition to the above, I attest that as local Chairman (Labor Representative) representing machinists on Norfolk Terminal, the following:

I progress discipline appeals to my General Chairman through the Federal Railway Act.

All benefits such as unemployment and sickness benefits are payable through the Federal Railway Retirement Board.

All machinists on Norfolk Terminal that I represent are treated as railway employees, *except* when one is injured at the east end of Lamberts Point Yard (the River End).

All machinists, in all parts of the Terminal, work under work rules set by the Railroad for all railroad employees. Also, they all work under safety rules set by the Railroad for all railroad employees on all parts of the Railroad system.

/s/ Raymond D. Wethington

Sworn and subscribed to before me, in the City of Norfolk, State of Virginia, this 3rd day of September, 1986.

/s/ Martha Early

My commission expires: 10-10-88